U.S. Department of Labor

Office of Administrative Law Judges
Seven Parkway Center - Room 290
Pittsburgh, PA 15220

(412) 644-5754
(412) 644-5005 (FAX)

DATE ISSUED: July 20, 2000

CASE NO.: 1998-LHC-2306

OWCP No.: 14-120608

In the matter of

GABRIELLE NIELSON,
Claimant

v.

U.S. NAVY EXCHANGE,
Employer

and

CRAWFORD & COMPANY,
Administrator

APPEARANCES:

Gordon W. Jenkins, Esquire
For the Claimant

Russell Metz, Esquire
For the Employer

BEFORE: RICHARD A. MORGAN
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This case arises from a claim for compensation under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et. seq*., hereinafter referred to as the "LHWCA" or the "Act" and the implementing regulations, 20 C.F.R. parts 701 and 702, as extended by The Nonappropriated Fund Instrumentalities Act, 5 U.S.C. § 8171, *et. seq*.,

("NAFIA"). The Act provides compensation to certain employees (or their survivors) engaged in maritime employment for occupational diseases or unintentional work-related injuries, irrespective of fault, occurring upon the navigable waterways of the United States or certain adjoining areas, resulting in disability or death. With limited exceptions, the Act provides the exclusive remedy for such injuries against maritime employers which have secured the payment of benefits. The NAFIA makes the Act applicable to certain civilian employees of the nonappropriated fund instrumentalities of the armed forces.

PROCEDURAL HISTORY[1]

The Claimant seeks permanent total disability benefits from July 26, 1995, through the present, for an alleged injury sustained on July 26, 1995. The Employer submitted a form, Associate's Notice of Injury, dated July 26, 1995 and signed by the Claimant. The form described the Claimant as having a sore right forearm from moving and unpacking boxes. (EX 2). Form LS-202, Employer's First Report of Injury or Occupational Illness, dated September 11, 1995, reports the Claimant's right arm was sore from an accident occurring on July 26, 1995. (EX 1). Claimant agreed that the claim for compensation Form LS-203, was not completed on July 26, 1995, as indicated on the form. The form was completed after Claimant retained her attorney, on March 18, 1997. (TR 131-132). On Form LS-203, Claimant described how the accident occurred as "shelf fell on me, boxes on top of shelves, picking up tables and couches." Claimant described her injuries as "neck, right arm, right hand, and left elbow aching, numbness and tingling in fingers." (EX 1; CX 5).

In the Employer's pre-trial statement, the employer agreed that the claim was timely noticed and filed. On December 4, 1997, the employer filed a Notice of Controversion of Right to Compensation. The Employer paid benefits starting on October 30, 1995. (EX 1). By letter dated December 29, 1997, the District Director informed Claimant that any additional benefits were denied. (CX 1). Claimant appealed the determination. On December 4, 1997 and April 27, 1998, the employer filed a Notice of Controversion of Right to Compensation. (EX 1, CX 3). On June 22, 1998, the Director, Office of Workers' Compensation Programs (OWCP), referred this case to the Office of Administrative Law Judges (OALJ) for a hearing. On April 26, 1999, Administrative Law Judge Torkington granted a continuance for the hearing scheduled for May 24, 1999. A hearing was scheduled before Administrative Law Judge Mapes, but was continued on October 10, 1999. The case was assigned to me on November 3, 1999.

A formal hearing was held before the undersigned on March 21, 2000, in Seattle, Washington, at which the parties were given a full and fair opportunity to present evidence and argument. No appearance was entered for the Director, Office of Workers' Compensation Programs ("OWCP"). Claimant's Exhibits (CX) 1 and 3-50 and Employer's Exhibits (EX) 1-22 were admitted to the record.

---

[1] The following references will be used: "TR" for the official hearing transcript; "ALJ EX" for an exhibit offered by this Administrative Law Judge; "CX" for a Claimant's exhibit; "DX" for a Director's exhibit; and, "EX" for an Employer's exhibit.

I. STIPULATIONS[2]

The parties stipulate and I find:

A. The Claimant is covered by the Act which applies to this proceeding.

B. The Claimant and the Employer were in an employee-employer relationship at the relevant times.

C. The Claimant sustained an injury July 26, 1995.

D. The injury occurred in the course and scope of the Claimant's employment.

E. The Claimant provided timely notice of her injury to the Employer.

F. The Claimant's claim for compensation was timely filed.

G. The Claimant's average weekly wage ("AWW") is $174.12.

II. ISSUES

A. Whether the Claimant continues to suffer from, and require further medical care and treatment for, a work-related injury, impairment or disability suffered on July 26, 1995?

B. Whether the Claimant is permanently and totally disabled because of work-related injuries which occurred on July 26, 1995?

C. Whether the Claimant's disability benefits, which were terminated by the employer in December of 1997, should be reinstated to the time that the Claimant is adjudicated as permanently and totally disabled and continuing through the duration of that disability?

D. Whether the Employer should pay the Claimant's medical expenses pursuant to Section 7 of the Act, less amounts paid by the employer, and whether the Employer should provide such additional services as the Claimant's condition may require?

III. FINDINGS OF FACT

[2] The private parties cannot bind the Special Fund absent the Director's agreement to the stipulations. *Brady v. J. Young & Co.*, 17 BRBS 46 (1985), *aff'd on recon.*, 18 BRBS 167 (1985) cited with approval in *Gupton v. Newport News Ship Building and Dry Dock*, 33 BRBS 94 (1999).

A. HEARING TESTIMONY

1. Claimant's Testimony

Claimant testified that she was born in Pocatello, Idaho, has a high school education, and graduated from beauty school in 1983. (TR 27). Claimant is currently a resident of Pocatello, Idaho. (TR 27). She has been married to Laurie Nielson for fifteen years. (TR 26). Claimant practiced cosmetology for five years and worked as a sales clerk for a year and a half in Utah and then moved to Washington. (TR 27-29). At the end on 1994, Claimant began working at the Navy Exchange as a sales clerk. (TR 30). As a sales clerk, she sold furniture, washers, dryers, refrigerators and other items. (TR 30). After her first injury, Claimant was moved to a different job selling toys, fishing supplies, weights, and bicycles. Claimant eventually was paid a little more than $7.00 an hour. (TR 31). Claimant normally worked four days a week, six to eight hours a day. (TR 32). Claimant agrees that her average weekly wage was $174.12. (TR 32-33).

Claimant testified that prior to working at the Navy Exchange, she was not involved in any accidents or injuries and had no physical limitations. (TR 33). Prior to the accident in July of 1995, Claimant injured her right forearm while she was picking up a table. Claimant did not file a workers' compensation claim for the injury. (TR 34). Claimant sought medical treatment for her injury from Dr. Sawicki. After a couple of months, Claimant testified that she no longer experienced pain from the injury. Claimant had no other health problems or injuries prior to July 1995. (TR 35).

The injury on July 26, 1995 occurred when Claimant was working in the toy and fishing department stocking shelves. (TR 35-36). Claimant was about to step down off the stool when the box fell and hit the Claimant on the left side on her left shoulder, face and neck area. (TR 36-38). When the box hit the Claimant, she twisted her neck to the right-hand side and tripped over a flat-bed truck, fell back and hit a metal shelf behind her. When she hit the floor, she was in a sitting position. (TR 39). The box was above the Claimant's head, about an arms-length, on the shelf. After she fell, her arm hurt a bit; but, Claimant did not think she injured herself. Her arm then became cold and tingly and her fingers went numb. (TR 40). Claimant told one of the supervisors about the accident. The supervisor told her to fill out a report before the end of the day. Claimant did not fill out the report because she could not write, her fingers were numb on her right hand. (TR 41). Claimant does not remember ever filling out a report. Claimant informed her supervisor that she was leaving work early because her arm was hurting. Claimant saw Mr. Sawicki for her injury. (TR 42).[3]

Claimant filled out the form for employee's claim for compensation when she was in Idaho. (TR 48) The document date of July 26, 1995, refers to the date of the accident. (TR 49-50). Claimant testified that the document labeled "Associate's Notice of Injury" is incorrect in reporting the injury occurred while she was "moving and unpacking boxes" and is incorrect in reporting that her right forearm was sore. (TR 50-52). Claimant testified that her elbow and

[3] Mr. Sawicki is a physicians' assistant.

hand were hurting on her July 26, 1995 visit to the doctor. (TR 54).

Dr. Sawicki recommended the Claimant have physical therapy. Claimant testified that after she started therapy, the pain was further up into her neck. (TR 55). Claimant experienced a "stiff neck" on the right side, towards the back of her neck. She also had pain in her shoulder, upper arm and experienced numbness and tingling. (TR 56). Claimant experienced pain and tingling when she would extend her arm. The pain started in her elbow, went up her neck and down her fingers. (TR 57). Claimant saw Dr. Nacht, a sports medicine doctor. (TR 58). Claimant testified that she had therapy for tendonitis. (TR 60).

After her injury, Claimant worked three to four hours every other day, for about two weeks, then she stopped working completely. (TR 63). Claimant testified that she experienced neck problems continuously, had bad headaches, and would rather stay in bed and lay flat, because moving was painful. Claimant testified that the physical therapy did not help. (TR 64). Dr. Nacht performed surgery on her elbow. Claimant testified that the surgery "helped a little bit," but she still experienced numbness and tingling in her fingers and down her arm, and her neck still hurt. (TR 65).

Claimant saw Dr. Simon in Idaho Falls who recommended physical therapy. (TR 65-66). The physical therapy was not successful in resolving the pain and Claimant was referred to Dr. Greenwald. Dr. Greenwald gave Claimant cortisone injection in her neck, which did not help. Claimant had surgery on the back part of her neck, which helped her pain. (TR 66). After the surgery, Claimant testified that she still had some pain, numbness and tingliness down her fingers. Claimant's left arm starting hurting after the surgery on her right arm. (TR 67). Claimant's left arm has gotten worse with numbness, tingliness, and throbbing of the elbow. Claimant experiences the same symptoms in her right arm. Claimant wears an elbow brace, on her left arm. (TR 68-69).

Claimant testified that she experiences pain in the morning. (TR 71). She has difficulty shopping for groceries because she has pain pushing the cart and reaching for items on shelves. Claimant feels pain lifting a gallon of milk. (TR 72). On an average day, Claimant frequently rests due to the pain and lays down two or three times a day for several hours to rest. (TR 73-74). Claimant takes muscle relaxers and pain pills. (TR 74). Claimant is seeing a counselor for her depression, anxiety and pain. Crawford & Company have not paid any medical bills since 1997. (TR 75).

Claimant was in a car accident in July of 1997. The accident occurred a week after the Claimant had rotator cuff surgery on her right shoulder. (TR 76). Claimant was in the back seat of the car when the car was rear-ended. Prior to the car accident, Claimant had pain in her left and right arms, and in her neck. After the accident, her neck was sore and she experienced extreme dizziness and headaches. (TR 77-78). Claimant did not notice any significant change in her arms or neck after the car accident. (TR 78).

From the time of her July 1995 injury, Claimant testified that she was not able to work. (TR 79-80). Claimant looked at various desk clerk jobs, but was not successful in finding a job.

Claimant was unable to find a job because she wore her neck and arm braces and could not perform certain job duties. (TR 79-80). Claimant testified that one to two times a week she spends the entire day in bed due to the pain. (TR 81).

The Claimant described the physicians she saw for her car accident and work related injuries. (TR 97-102). Claimant agreed that all of the medical bills listed in CX 50 are related to the incident at Navy Exchange except two visits with Dr. Geenwald and an MRI at Teton MRI of Idaho Falls. (TR 103). Claimant agreed that in her car accident she sustain physical injuries and dizziness. (TR 105). Dr. Greenwald treated Claimant for her auto and work accidents. (TR 110).

Claimant agreed that the claim for compensation was not completed on July 26, 1995, as indicated on the form. The form was completed after Claimant retained her attorney. (TR 131). Claimant agreed that she retained her attorney on March 18, 1997. (TR 132). Claimant agreed that her attorney filed the claim form on her behalf. (TR 134).

Prior to working at the Navy Exchange, the Claimant had two knee surgeries and a hip surgery. (TR 119-120). At the time of the trial, Claimant was on several medications. (TR 121). An Indian reservation is paying for the Claimant's medications. (TR 126). When the Claimant visited the doctors her husband and a representative from Crawford were present. (TR 145). Claimant testified that the Crawford representative took referral slips, for an MRI and a counselor, from the doctor and told the doctor that Crawford & Company would not accept the referrals. (TR 146-147). Claimant testified that the Crawford representative tried to discourage the doctor from allowing treatment for her neck because the representative would pull the doctor aside and talk with him. (TR 148).

Claimant testified that she had a heart problem when she was five years old, had a hip problem twelve years ago and had a knee problems in 1981 and 1985. (TR 148-149). Claimant had no significant medical problems for at least five years prior to her work accident. (TR 149). Claimant testified that she did not fill out a form earlier because she thought the employer knew about the accident, and she was seeing doctors. (TR 152).

2. Laurie Nielson's, Claimant's Husband, Testimony

Laurie Nielson, Claimant's husband, testified at the hearing. (TR 156). Prior to July 26, 1995, Mr. Nielson testified his wife was in good health. (TR 156-157). Mr. Nielson testified that after her work accident, his wife would not bend her neck, would not bend to pick things up, and her demeanor changed. His wife was unable to drive because she could not turn her head to look. (TR 157). He testified that when his wife came home from therapy she was crying from the pain. Mr. Nielson testified that as time went on, his wife could hardly hold her coffee cup. (TR 158). Mr. Nielson stated that his wife's condition worsened and she threatened to kill herself. Mr. Nielson opined that his wife's elbow surgery did not help her. (TR 159). Prior to Claimant's rotator cuff surgery, Mr. Nielson stated his wife was not sleeping and would not do anything. After the surgery, Mr. Nielson testified that his wife could lift her arm and hold things. Claimant still had problems reaching over her head and complained that her neck was hurting. (TR 160).

After her neck surgery, Claimant was able to reach things that she was not able to reach before the surgery. (TR 161).

Mr. Nielson testified his wife started complaining about problems with her left arm before they left Washington. (TR 161). After the automobile accident, Mr. Nielson testified that his wife suffered from dizziness and pain in her neck. (TR 161-162). Prior to the automobile accident, Mr. Nielson testified his wife's neck pain never totally went away. (TR 162). Mr. Nielson testified that his wife lays down three or four times a day for a couple of hours, and on bad days does not do anything but lay down. (TR 163).

Mr. Nielson opined that his wife is unable to do a cashier job, because looking down at the cash register would increase her neck pain. Mr. Nielson testified that his wife tried to interview at all of the places the Crawford representative recommended for a job, but none of the employers called her back. (TR 165). At the time the Claimant interviewed for jobs, her treating physician had not released her to work. Mr. Nielson testified his wife was interested in working. (TR 166). Mr. Nielson stated his wife wears her arm brace most of the time and her neck brace during bad weather. (TR 167). Mr. Nielson and Claimant moved to Idaho in March or April of 1997. (TR 168).

3. Merrill Cohen's, Vocational Rehabilitation Counselor, Testimony

Ms. Merrill Cohen, a vocational rehabilitation counselor, testified at the hearing. (TR 169). Ms. Cohen has been a vocational counselor for six or seven years. (TR 170). Ms. Cohen reviewed the Claimant's medical records and interviewed the Claimant. (TR 171). Ms. Cohen identified and recommended customer service representative, desk clerk, sales associate and receptionist jobs. Given Claimant's age, medical restrictions, transferable skills, education and employment history, Ms. Cohen opined the Claimant was capable of performing the listed jobs. The jobs paid between $5.15 to $7.85 per hour. Ms. Cohen opined that Claimant would be a competitive candidate for each of these jobs and the jobs were available in September of 1999. (TR 173).

Ms. Cohen referred to Dr. Walker's March 27, 1998 report for the Claimant's physical restrictions and limitations. (TR 176-179). Ms. Cohen identified seven open positions in the Pocatello area that Claimant could perform. (TR 180). For each job, Ms. Cohen had a detailed description of the job, physical demands, minimum qualifications, responsibilities, wage and discussed the Claimant's background with the employer. (TR 181). Ms. Cohen did not discuss with the employers that the Claimant may have to lay down two to four times a day. Ms. Cohen agreed that if the Claimant had to lay down for two hours during the day that her opinion would change regarding the available jobs. (TR 182). Ms. Cohen does not interpret the medical information, she relies on the recommendations from the physicians on physical limitations. (TR 186). Ms. Cohen stated that based on Dr. Walker's limitations the jobs she listed are suitable. Based on Dr. Greenwald's opinion that she is not capable of working, then no job is suitable. (TR 190).

B. MEDICAL EVIDENCE

Dr. Bethel submitted his examination records from July 25, 1995 until September 25, 1995. (CX 9). On July 27, 1995, Gerald Sawicki, PA-C, reported the Claimant had problems in 1994, which were resolved completely and the accident on July 26, 1995 was a new occurrence. Claimant's hands were sore and tingling. He diagnosed tenosynovitis right forearm secondary to overuse syndrome. In a letter dated August 30, 1995, Dr. Bethel reported he was treating Claimant for an injury that occurred during her employment on July 26, 1995 and diagnosed her with tenosynovitis of the right forearm. Dr. Bethel reported the Claimant was slowly improving.

The Employer and Claimant submitted office records from the After Hours Clinic dated August 26, 1994 through September 25, 1995. (EX 4, CX 6, CX 7, CX 13). On August 26, 1994, James A. Van, PA-C, reported the Claimant suffered a strained right forearm while lifting a table. Claimant had several visits regarding her arm strain and pain. Dr. Van reported on October 17, 1994, that Claimant's forearm was feeling better. On July 26, 1995, Gerald Sawicki, PA-C, reported Claimant hurt her right arm while lifting at work and was having pain in her right forearm. Mr. Sawicki diagnosed mild tenosynovitis of right forearm. On July 27, 1995, Gerald Sawicki, PA-C, reported the Claimant suffered a very sore, painful forearm, and he diagnosed tenosynovitis. He reported that Claimant had previous problems with her wrists and hands because of work in 1994, but they completely resolved, and noted this was a new occurrence. On August 16, 1995, Mr. Sawicki, noted Claimant has been going to physical therapy and wearing a wrist immobilizer. He noted that Claimant was almost finished with physical therapy and that there was improvement with a decrease in elbow symptoms. Mr. Sawicki noted the Claimant suffered pain in her shoulder and a little soreness in the neck, but "nothing severe." (CX 9, CX 7). On August 30, Mr. Sawicki reported the Claimant was slowly getting better. On September 25, 1995, Mr. Sawicki referred Claimant to orthopedics sports medicine physician because persistent tenosynovitis without much improvement.

Dr. William Scheyer submitted his medical reports dated October 3, 1995 and October 25, 1995. Dr. Scheyer diagnosed acute tenosynovitis and acute lateral epicondylitis of the right elbow and tenosynovitis of the right wrist. Dr. Scheyer reported an overuse injury. (EX 22). On October 3, 1995, Dr. Scheyer reported Claimant was unemployable while under treatment for job related acute elbow and wrist injury. (CX 20). On October 24, 1995, Dr. Scheyer reported Claimant experienced pain and was unable to brush her hair. (CX 10).

Dr. Nacht, Board-certified in orthopaedic surgery, submitted his examination records dated November 1, 1995, through July 19, 1996. (CX 8; EX 5). On November 1, 1995, Dr. Nacht reported under the Claimant's history that she developed pain in her right elbow in July of 1995. He reported that Claimant's treating physician, Dr. Scheyer, took Claimant off work on October 3, 1995, due to pain. Dr. Nacht noted the Claimant performed repetitive activities such as keypunching and using a pricing gun which may have created some of her problems. The Claimant complained of aching discomfort that radiates down her hand to her wrist and fingers. Upon physical examination, Dr. Nacht noted the Claimant was in no obvious discomfort; had a full range of motion in her elbow, wrist and hand; and, had some tenderness. Dr. Nacht diagnosed tendinitis in her right forearm and wrists, involving both the flexors and extensors. Dr. Nacht injected corticosteroid into her right extensor tendon. (CX 13).

Dr. Nacht submitted a letter dated December 6, 1995. Dr. Nacht opined that if the Claimant does not have surgery, he does not expect her to improve. Dr. Nact recommended the Claimant be restricted to light duty until she has surgery. Dr. Nacht reported the Claimant will reach maximum medical improvement in approximately three months after surgery. Dr. Nacht opined that Claimant's condition is related in part to work and in part to her hypermobile ulnar nerves which were made symptomatic by her repetitive tasks on the job at the Navy Exchange.

Dr. Nacht performed ulnar nerve transposition surgery on December 22, 1995. (EX 5). His post-operative diagnosis was chronic, recurrent subluxation right ulnar nerve with tardy ulnar palsy. On April 23, 1996, Dr. Nacht reported Claimant's right ulnar nerve is irritable and slow to recover. (CX 8). May 1, 1996, Dr. Nacht reported that Claimant's symptoms were the same with continued weakness in her right hand, numbness and tingling, pain from her elbow down into her hand; and symptoms on her left side which are mild and manageable. Dr. Nacht reported he gave his tentative approval for Claimant to return to work within the job description. Dr. Nacht released Claimant to work for four hours per day three days a week for two weeks. (CX 8, EX 5).

On May 6, 1996, Dr. Nacht found the Claimant unable to return to work. On May 14, 1996, Dr. Nacht reported the Claimant returned to work for two of her three assigned days and then took a week off because of increasing symptoms. Dr. Nacht examined the Claimant on May 29, 1996. (CX 8). Claimant complained of pain in her right hand and left hand. Claimant has been working intermittently and complains of pain while working. Dr. Nacht examined the Claimant on June 18, 1996. (CX 8). Dr. Nacht reported that Claimant has increased weakness and pain when she used her arm at work and her left elbow was hurting. Dr. Nacht opined that Claimant may have a double crush syndrome with cervical radiculopathy along with ulnar neuropathy and Claimant had symptoms in her left ulnar nerve at the level of the cubital tunnel.

Dr. Nacht examined the Claimant on July 9, 1996. (CX 8). Dr. Nacht reported the Claimant saw Dr. Ma who stated Claimant did not have a double crush syndrome, but her continued problems with her right arm were due to neuritis in the ulnar nerve and hypersensitivity in the elbow, forearm, and hand. Claimant complained of pain around the elbow, forearm, and hand. Dr. Nacht reported the Claimant worked a limited duty and after working was incapacitated a couple of days by the discomfort in her arm. Dr. Nacht opined that the Claimant's overall condition is not fixed and stable, and she suffers from sleep disorder, depression, severe discomfort in her right arm, and chronic pain management dilemma. Dr. Nacht recommended a coordinated chronic pain management program. Dr. Nacht recommended the Claimant stay off work indefinitely. By letter dated July 24, 1996, Dr. Nacht reported Claimant's husband called concerned about his wife expressing suicidal tendencies. Dr. Nacht submitted for approval from Crawford to send Claimant to a psychotherapist. (CX 13).

An electrodiagnostic report, dated December 4, 1995, Dr. Edgar Steinitz, reported: on the right side Claimant has an ulnar motor and sensory slowing across the elbow segment C/W a mild right ulnar neuropathy/ Cubital Tunnel Syndrome; significant ulnar nerve conduction velocity slowing across the elbow segment with mild ulnar sensory amplitude loss and slight waveform

dispersion across the elbow; on the left side there is mild ulnar sensory slowing across the elbow, the right side is more significant; and, there are no findings to support significant right or left median neuropathy at the wrist/Carpal Tunnel Syndrome. On May 24, 1996, Dr. Mohammad Saeed reported the electrodiagnostic study revealed mild right ulnar neuropathy across the elbow, no evidence of right carpal tunnel syndrome, and limited EMG is unremarkable. (EX 6, CX 12).

On March 25, 1996, Terry Moon OTR/L and Stephen Winters, MS, PT, submitted a Performance-Based Functional Capacities Evaluation. Mr. Moon stated the Claimant's performance was consistent. Claimant performed at the sedentary level of work during the evaluation. Claimant reported pain in her right elbow and lower arm. Mr. Winters reported Claimant displayed continuous pain, grimacing, slowed pace, shaking arms and shaking hands, throughout the evaluation. Mr. Moon opined Claimant lacks the ability to effectively self-manage her pain, has generalized right upper extremity weakness, and bilateral signs of ulnar nerve movement restrictions. Mr. Moon recommended intensive hand therapy and occupational therapy on a daily basis. Mr. Moon noted if modified employment is available, Claimant can work four hours per day, gradually increasing. (CX 14).

Dr. Thomas Grow, Board-certified in orthopaedic surgery, submitted an independent medical examination on May 17, 1996. (EX 7, CX 15). Dr. Grow noted the Claimant complained of pain in the side of her forearm radiating into her right hand, elbow, and up around her shoulder. Dr. Grow reported the Claimant stated her difficulties started in June 1995 when she developed pain in her arm which worsened and she was unable to move her right arm. Claimant was released to return to work in May of 1996, but the pain worsened when she returned to work. Dr. Grow reported Claimant's pain worsens with repetitive motion, such as pushing buttons at work. Dr. Grow noted Claimant has very little neck pain or stiffness. Dr. Grow noted the Claimant's job as a cashier required her to occasionally lift 10 to 20 pounds and frequently lift under 10 pounds. Upon physical examination, Dr. Grow noted Claimant does not have the same strength in the right hand as she does in the left. Dr. Grow noted numbness and tingling down her arms. Claimant suffers pain with shoulder movement and experienced pain in her neck with cervical spine motions. Dr. Grow noted considerable wincing, pulling away, grimacing activity, and guarding of the right upper extremity.

Dr. Grow opined that Claimant's signs and symptoms are related to the industrial injury, and that there is considerable psychological overlay. Dr. Grow opined the Claimant could work two hours a day and eventually return to full activity. Dr. Grow concluded that Claimant is not fixed and stable and that it is too soon to rate her.

Dr. Kelvin K. Ma, a Board-certified neurologist, examined the Claimant on June 27, 1996. (EX 8, CX 16). Dr. Ma reported Claimant worked as a sales clerk and cashier and that her injury was due to repetitive use of her right arm. Dr. Ma noted the Claimant had to move and unpack boxes, and squeeze a price gun and developed soreness in the right forearm. Dr. Ma reported the Claimant experienced pain in the right forearm, wrist and hand. Dr. Ma noted that activities aggravate the pain. Claimant experiences pain in her shoulder radiating to the right upper arm. Dr. Ma diagnosed right cubital tunnel syndrome, status-post ulnar nerve transposition, related to the injury on a more probable than not basis; and right forearm, hand and wrist pain, most likely

of soft tissue origin, related to the injury on a more probable than not basis. Dr. Ma did not find any evidence to suggest cervical radiculopathy. Dr. Ma reported the Claimant's condition is not fixed and stable and will require further observation and treatment. Dr. Ma reported the Claimant is not likely to have further damage of the right arm if she continues to work at her current level and modified work.

Dr. David Simon, Board-certified in Physical Medicine and Rehabilitation, submitted a report dated September 4, 1996. (EX 9). Dr. Simon noted the Claimant reported problems with her right arm related to her work activities in the summer of 1995 and denied any particular injury. Dr. Simon noted the Claimant stated that one day she began having pains in her arm. Dr. Simon noted Claimant was taken off work in October of 1995. Dr. Simon reported that the Claimant complained of headaches, difficulty sleeping, increased stiffness in the morning, weakness in both arms, numbness in her right arm, numbness in fingers, and her hands were cold. Dr. Simon diagnosed right cubital tunnel syndrome; right arm pain, possibly sympathetic mediated pain syndrome or reflex sympathetic dystrophy, complaints of pain seem to be out of proportion to her injury. Dr. Simon recommended a trial of elavil to help with ulnar nerve symptoms and followup in two weeks. Dr. Simon submitted a letter dated September 9, 1997. Dr. Simon reported Claimant's median sensory nerve responses were within normal limits; ulnar sensory responses were normal bilaterally and right ulnar motor response was normal; left ulnar motor nerve showed mild slowing of the conduction velocity across he elbow; normal needle EMG of bilateral upper extremities and cervical paraspinals. Dr. Simon found no electrodiagnostic evidence of cervical radiculopathy.

Dr. Mohammad Saeed, Board-certified in physical medicine and rehabilitation, issued a letter dated May 24, 1996. (CX 8). Dr. Saeed found in a electrodiagnostic study that Claimant's right ulnar sensory and motor conductions are slow across the elbow and median sensory and motor distal latencies are normal across the wrist. Dr. Saeed found no evidence of right carpal tunnel syndrome and diagnosed mild right ulnar neuropathy across the elbow.

On his physical therapy evaluation dated September 19, 1996, Mr. Pearson reported Claimant suffers constant and chronic pain, numbness and tingling in her fingers, and her hand aches all the time. Mr. Pearson reported Claimant had fibromyositis with right sided cervical radiculitis. On March 3, 1997, Mr. Pearson reported the Claimant has temporary relief of her pain with warm pool exercises and ultrasound; however, her symptoms return with any exertion. Mr. Pearson noted that Claimant's pain has been the major barrier to her rehabilitation. (CX 18).

Dr. Simon submitted his notes from September 19, 1996 through April 14, 1997. (CX 20, CX 29). On September 4, 1996, Dr. Simon reported that Claimant worked at the Navy exchange when she began having pains in her right arm and noted an apparent repetitive strain type of injury. Claimant complained of headaches, difficulty sleeping, stiffness in the morning, weakness in both arms, and numbness in her hands. Dr. Simon diagnosed right cubital tunnel syndrome, status post right ulnar nerve transposition with continued symptoms in the ulnar nerve distribution and right arm pain, sympathetic mediated pain syndrome or reflex sympathetic dystrophy. On May 8, 1997, Dr. Simon finds a torn right shoulder tendon which may explain Claimant's complaints of pain and disability. On March 26, 1997, physical therapist Mr. McClelland reported

Claimant has pain with pins and needle feeling in her forearm and hand, and pain in her arm and shoulder. On April 7, 1997, Dr. Simon reported claimant suffered a lot of pain in her right shoulder area. On April 23, 1997, Dr. Simon opined that based on Claimant's medical records and own account, he stated that Claimant's current neck and shoulder problems are more likely than not related to her July 26, 1995 injury. Dr. Simon examined Claimant on May 8, 1997. (EX 30). Dr. Simon reported an MRI of the right shoulder revealed a full thickness tear of the anterior aspect of the supraspinatus tendon.

Claimant submitted MRI reports from Teton MRI of Idaho Falls, dated September 27, 1996 to November 10, 1997. (CX 26). Dr. Steven Austin interpreted the MRI dated September 27, 1996, which revealed a disc herniation at C5-6 level lateralizing towards the right; and a small disc protrusion which is predominately central although skewed minimally toward the right. Dr. Funk interpreted the February 20, 1997 MRI as interval anterior discectomy, interbody fusion and anterior plating of C5-C7, AP diameter of central canal is larger than it was preoperatively; mild, diffuse residual indentation on the ventral subarachnoid space from C5-C7, but no definite residual or recurrent disc herniation. On May 6, 1997, Claimant reported that she was injured on July 26, 1995 when boxes fell down on her from the top shelf. Dr. Merriam interpreted the MRI as suspicious for full-thickness tear of the anterior aspect of the supraspinatus tendon 1 cm medial to its greater tuberosity attachment. On November 11, 1997, Dr. Alan Wray reported the MRI revealed postoperative changes on an anterior fusion at C5-6 and C6-7 with an anterior plate placed. Dr. Wray noted mild effacement of the ventral subarachnoid space at the C5, C6 and C7 levels and no disc herniation.

Dr. Richard C. Hill submitted his examination records dated October 28, 1996 through December 6, 1996. (CX 17). On October 28, 1996, Dr. Hill diagnosed herniated discs of the cervical spine and noted Claimant awaits neck surgery with Dr. Greenwald. Claimant was unsure of the exact time of the injury. On November 13, 1996, Dr. Hill reported Claimant was experiencing dizziness. On December 5, 1996, Dr. Hill reported the Claimant was having problems with her neck.

Dr. Greenwald submitted his office notes. (EX 10, CX 27, CX 28, CX 30). On October 16, 1996, Dr. Greenwald noted that Dr. Simon recommended further evaluation of Claimant for neck and arm pain. Dr. Greenwald reported a work related injury in June of 1995 while working at the Naval Base. Dr. Greenwald noted Claimant was complaining of neck pain with pain into her right shoulder, pain in her distal right upper extremity down to her fingers, and some pain on her left side. Dr. Greenwald noted an incident where shelves fell on her about one month before the reported original injury. Dr. Greenwald noted Claimant experienced pain on palpation in her neck. Dr. Greenwald opined that Claimant was suffering from radicular and peripheral neuropathic process. On October 25, 1996, Dr. Greenwald reported Claimant was experiencing neck pain and noted a herniated disc at C5-6 and C6-7. Claimant agreed to surgery for anterior cervical decompression and fusion. On December 10, 1996, Dr. Greenwald diagnosed C5-6, C6-7 herniated nucleus pyopoiesis and surgery was performed. Upon surgery, Dr. Greenwald found severely degenerated disc at C6-7 that was pushing into the posterior longitudinal ligament; degenerative disc at C5-6, herniated posterior to the vertebral body of C5; and two 12 mm bone plugs were placed. Dr. Ellewien submitted a tissue report dated December 10, 1996, of the disc

C5-7 which revealed fragments frayed and degenerating fibrocartilage.

On January 16, 1997, Dr. Greenwald reported the Claimant feels better overall, but still suffers from pain and numbness extending into her right arm. Upon examination of her neck, Dr. Greenwald noted Claimant's effort was very poor and she made low vocalizations while attempting to perform maneuvers. On January 31, 1997, the doctor reported the Claimant called and stated she thought about harming herself. Dr. Greenwald reported that Claimant had pain in her neck radiating down her arms and suffered from neck spasms. Dr. Greenwald recommended a counselor.

In February of 1997, Claimant complained of muscle spasms. Dr. Greenwald opined on March 5, 1997, that Claimant could be suffering from reflex sympathetic dystrophy. On June 11, 1997, Dr. Greenwald examined Claimant for radiating pain in her neck. On July 31 1997, Dr Greenwald reported motion on the spinous process and widening of the disc space at C6-7. Dr. Greenwald noted on August 29, 1997, the Claimant was having more pain in her neck with radiation into her arm and physical therapy on her shoulders seems to make it worse. On October 6, 1997, Dr. Greenwald reported Claimant did not have any disequilibrium prior to the car accident in July. Dr. Greenwald diagnosed an Arnold Chiari malformation and pseudoarthrosis of C6-7 with a lot of neck pain radiating to fingers of her right hand. Claimant agreed to surgery. On October 30, 1997, Claimant reported a pop in her neck and severe pain radiating from her neck to the right shoulder. Dr. Greenwald reported non-union of C6-7, and did not find the cause of the pain in her neck. On November 17, 1997, Dr. Greenwald reported Claimant has had neck and shoulder pain since a work related accident.

On March 19, 1998, Dr. Greenwald reported Claimant had pain in her arm and she complained of weakness in her left abduction. Dr. Greenwald reported transposition and neurolysis of the right ulnar side. Claimant complained of a lot of pain in her neck down between her shoulder blades. Dr. Greenwald noted pseudoarthrosis at C6-7 with lucency of the bone. He opined that the etiology of pain in her neck and arms is complex and multi-factorial. Dr. Greenwald noted that pseudoarthrosis at C6-7 can be repaired through a posterior approach with spinous process wiring and bone harvested from the iliac crest. Dr. Greenwald also reported an ulnar transposition can be done on both elbows, with the success rate of about 60%. Dr. Greenwald noted on May 6, 1998, that Claimant has pseudoarthrosis in her neck and he cannot opine whether fusing at that level will make her feel better. Dr. Greenwald noted Claimant was very depressed about her injuries.

Claimant submitted notes from the Physical Therapy Department of Eastern Idaho Regional Medical Center, Pain Management Clinic dated March 5, 1997 through April 4, 1997. (CX 19).

Dr. Greg Biddulph submitted medical records from June 4, 1997 until March 13, 1998. (EX 11, CX 25, CX 27; CX 28). On June 4, 1997, Dr. Biddulph reported the Claimant had an accident on July 26, 1995, when boxes fell on top of her shoulder and outstretched upper extremities. Claimant complained of numbness in her ulnar two digits. Upon physical examination, Dr. Biddulph noted the Claimant had a stiff neck and appeared to have pain in her

neck. Dr. Biddulph reported the Claimant had a large rotator cuff tear, which he opined would not be amenable to arthroscopic repair. Dr. Biddulph recommended surgery. On June 24, 1997, Dr. Biddulph performed surgery to repair a right shoulder rotator cuff tear. On July 3, 1997, Dr. Biddulph reported the physical therapist said the Claimant was non-compliant at therapy and was hypersensitive to pain. On July 9, 1997, Dr. Biddulph noted that Claimant was involved in a motor vehicle accident where she was rear ended and suffered a whip lash injury. Claimant does not think that she injured her shoulder. On August 6, 1997, Claimant said her pain and numbness dramatically improved after her right rotator cuff repair. On September 17, 1997, Dr. Biddulph reported the Claimant's shoulder pain has dramatically decreased; however, Claimant was tearful due to severe neck pain. On December 15, 1997, Claimant complained of some chronic pain in the upper extremity and dorsal forearm musculature and experiences numbness in her fingers.

Dr. Cobiella submitted records dated March 11, 1997 through August 5, 1997. (CX 24). On May 11, 1997, Dr. Cobiella reported Claimant's physical therapist referred Claimant for evaluation of depression.

On June 11, 1997, Dr. Madden interpreted an x-ray as demonstrating evidence of nonfusion at C6-7 with almost complete resorption of the bone plug, noted a linear lucency at C5-6 suggesting nonfusion at this level. (CX 27). On March 6, 1997, Dr. Neeley reported interbody fusions at C5-6 and C6-7. On January 16, 1997, Dr. Wray reported status post anterior fusion of C5-6 and C6-7.

The Claimant visited the emergency room on June 29, 1997 for a 25 pound weight gain in two weeks and shortness of breath. (CX 28). Dr. Barnett diagnosed left pleural effusion, mild congestive heart failure and peripheral edema, probably secondary to intravenous fluid overload.

On July 8, 1997, the Claimant was seen at the emergency room and examined by Dr. Parmley. Dr. Parmley noted Claimant was involved in a low-velocity motor vehicle crash. Claimant complained of neck pain. Dr. Parmley diagnosed an acute neck strain. (EX 12, CX 28).

On September 8, 1997, Alice Kaye Guyer, licensed professional counselor, diagnosed Claimant with mood disorder due to medical condition with major depressive-like episode, underweight, shoulder pain, neck and arm problems, medical and occupational problems. Ms. Guyer reported Claimant experienced a lot of anxiety and depression because of her injuries. (CX 21).

Dr. Daniel Hinckley submitted a letter dated September 10, 1997. Dr. Hinckley reported the audio and ENG tests were normal except for a fixed left median nystagmus with eyes closed, which may indicate nerve injury. (CX 23). On April 29, 1998, Dr. Hinckley reported Claimant complained of light-headed sensations, migraine headaches, imbalance and vertigo. (CX 23).

On October 10, 1997, Claimant was examined by a panel, Dr. Michael Phillips, Board-certified in Orthopaedic Surgery, and Dr. Richard Hammond, Board-certified in neurology. The panel submitted a review Claimant's medical records. (EX 13). The panel noted the Claimant suffered dizziness, but found no indication that her cervical spine condition incurred a permanent

aggravation with the motor vehicle accident. The Claimant complained of right paracervical neck pain, pain in the medical aspect of the left elbow, numbness in both hands, pain in the right elbow, and episodes of dizziness.

The panel opined that the Claimant's right ulnar nerve neurolysis and anterior transposition was the direct result of her work activity on July 26, 1995. The most recent electrophysicological testing documents significant improvement in the right cubital nerve syndrome. The panel opined that the Claimant could return to her previous work activity as a cashier in regard to the right ulnar nerve cubital syndrome. The panel opined that the anterior cervical discectomy and fusion performed on December 10, 1996, is related to the natural progression of documented pre-existing degenerative disease of the cervical spine, and in no way the result of her reported work activity in 1995. The panel opined that the rotator cuff surgical repair on June 24, 1997, on a more probable than not basis was precluded by an unrelated pre-existing condition in the shoulder, not related to the work incident in 1995 nor the motor vehicle collision in 1997. The panel opined that Claimant's current symptoms are pain-behavior related and should be modified by non-surgical measures. The panel found the subluxing left ulnar nerve is a coincidental finding and is not related to either the Claimant's work activity or the motor vehicle accident.

Based on a review of the Claimant's medical records and examination, the panel found the Claimant could participate in light work activity with a lifting restriction of 10 pounds, limited overhead activity, limited time sitting with neck in flexed position. The panel reviewed the evaluation for cashier and clerk and found some requirements outside Claimant's limitations and opined that Claimant is unable to return to that job.

On January 21, 1998, Audiologist Susannah DeMill performed a vestibular evaluation for Claimant's complaints of spinning sensation and feeling off balance, which started in June 1997 after she was involved in an automobile accident. Ms. DeMill found slight vestibular dysfunction on the sensory organization test. Ms. DeMill suggested possible basilar artery migraine or cervical vertigo, where patients with neck injury experience altered neck proprioceptive input and cause a balance abnormality. (CX 23).

Dr. Walker, Board-certified in physical medicine and rehabilitation, examined Claimant on March 27, 1998. (CX 28, CX 29). Dr. Walker examined the Claimant and reviewed her medical records. Claimant complained of constant pain in her neck, bilateral elbow pain, tingling in her fingers, weak hands, and weak arms. Upon physical examination, Dr. Walker noted Claimant moved in a guarded fashion and Claimant complained of pain with movement of her neck. Dr. Walker reported tenderness in Claimant's low cervical area across the trapezius muscles, tenderness at the bilateral elbows, and minimal right shoulder tenderness. Claimant reported to Dr. Walker that she was injured at work in July of 1995 while lifting and she heard a snap in her right upper extremity. Claimant reported a second injury when she fell at work. Dr Walker reported Claimant continues to have significant neck pain complaints with reduced active motion and noted that it is not clear whether her reduction in motion is on a conscious or unconscious level. Dr. Walker reported Claimant had good results from her rotator cuff repair. Dr. Walker noted status post right ulnar nerve transposition, where the nerve appears to have moved back

into its ulnar grove and Claimant suffers symptoms. Dr. Walker reported a hypermobile left ulnar nerve. As a result of her neck complaints, Claimant has limited grip strength and pinch strength. Dr. Walker opined that Claimant has significant psychological overlay to her symptoms with difficulty coping with pain, with chronic pain syndrome. Dr. Walker opined that it would be extremely difficult for Claimant to ever return to productive work without a chronic pain management program. Dr. Walker recommended a psychiatrist to assess whether Claimant would be successful in a pain management program. Dr. Walker opined Claimant could only tolerate sedentary or very light duty without repetitive motion at the elbows. Dr. Walker opined that Claimant's inability to return to work may not actually be due to her musculoskeletal symptoms, but rather due to her inability to cope with her pain in a productive fashion due to her psychological state.

Dr. Walker examined the Claimant on June 29, 1998. (EX 14, CX 29). Claimant complained of neck pain, headaches, trouble sleeping, night-time pain, and loss of motion in the neck. Dr. Walker diagnosed chronic neck pain, which developed in 1996; he noted that Claimant complained of dizziness which occurred after motor vehicle accident in July 1997; and Dr. Walker opined that Claimant suffered from chronic pain syndrome with significant dysfunction and inability to return to productive work. Dr. Walker opined the Claimant should not rely on a neck brace on a daily basis; recommended a referral to a neuropsychologist and for psychologic counseling and chronic pain management.

Richard G. McCollum, Board-certified in orthopaedic surgery, submitted a report dated September 9, 1999. (EX 19). Dr. McCollum reported the Claimant was injured when she was putting a box up on a shelf and it started to fall, and she backed up and fell down. Claimant reported that her right elbow, left elbow, right shoulder, and neck were injured in the accident. Claimant was in a motor vehicle accident in July of 1997, which increased her neck symptoms. Claimant complained of the nerve at the right elbow "popping out" again after surgery, she experiences pain in her elbows and neck, and has dizziness. Dr. McCollum summarized the Claimant's medical records. Upon examination, Dr. McCollum reported the Claimant was in no acute distress. Dr. McCollum diagnosed cubital ulnar nerve syndrome of the right elbow status post ulnar transposition; subluxating ulnar nerve of the left and right elbow; rotator cuff tear of the right shoulder post repair; degenerative disc disease of the cervical spine status post arthrodesis from C5 to C7 with pseudarthrosis at C6-7. Dr. McCollum found no relationship of Claimant's neck or right shoulder to the work accident. Dr. McCollum also questioned whether ulnar subluxations of the elbow were related to the accident. Dr. McCollum noted that tardy ulnar nerve syndrome can occur as a result or a direct blow to the elbow or from a repetitive motion. However, Dr. McCollum opined that there is no indication the Claimant had this kind of injury, and she only worked for two years at the institution. Based on the absence of any neurological deficits, Dr. McCollum found no evidence of any impairment of her ulnar subluxations on both sides. Dr. McCollum opined that Claimant did not suffer impairment from her right shoulder condition. Dr. McCollum found that the motor vehicle accident did not significantly aggravate any of her conditions.

D. VOCATIONAL EVIDENCE

Ms. Betty A. Cross, certified disability management specialist and rehabilitation counselor, was employed by Crawford and Company to conduct a vocational evaluation and submitted a report dated November 14, 1997. (EX 16). Ms. Cross noted the Claimant was injured on July 26, 1995 while working for Navy Exchange as a cashier and noted an onset of complaints with repetitious activity of moving furniture. Ms. Cross summarized Claimant's medical treatment history and interviewed the Claimant and her husband. Ms. Cross reported the Claimant worked for Navy Exchange for two years as a cashier. Ms. Cross reported Claimant's transferable vocational skills. Ms. Cross opined that employment can be found within the physical restrictions noted by Dr. Michael Phillips. Ms. Cross reported that Claimant continues to experience numerous ongoing physical symptoms as a result of her previous surgeries and it may be difficult for her to actively participate in a job search. Ms. Cross recommended that Navy Exchange be contacted to determine their ability to offer a light duty cashier position, develop a job analyses for alternative occupations, and provide a labor market survey. Ms. Cross submitted data on a telemarketer, a jewelry salesperson/cashier, an elementary teacher aide II, and a cashier checker.

On January 16, 1998, Betty Cross issued a status report. (EX 16). Ms. Cross reported that Dr. David Simon approved the Job Analyses, but noted on the teacher aide that Claimant should rarely lift 20-25 pounds, but could frequently lift up to ten pounds. Ms. Cross noted that it may be possible for Claimant to return to her job of injury as a cashier. Ms. Cross contacted Navy Exchange who indicated that a cashier position was open and would pay between $6.00 and $6.15 per hour. Claimant was earning $5.91 per hour at the time of her injury.

IV. CONCLUSIONS OF LAW

It is well established that, in arriving at his or her decision, an Administrative Law Judge is entitled to evaluate the credibility of all witnesses and to draw his or her own inferences and conclusions from the evidence. *Quinones v. H.B. Zachery, Inc.* 1998 WL 85580 (Ben. Rev. Bd. Feb. 10, 1998). Accordingly, the Administrative Law Judge's credibility determinations will not be disturbed unless they are inherently incredible or patently unreasonable. *Id.; Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). It has been consistently held that the Act must be construed liberally in favor of claimants. *Voris v. Eikel*, 346 U.S. 328, 333, 74 S.Ct. 88, 98 L. Ed. 5 (1953); *J. B. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967).

A. JURISDICTION

The parties have agreed and I find that the Claimant's employment as a cashier at the U.S. Navy Exchange, falls under the extension of the LHWCA, The Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171, *et. seq.*, which covers civilian employees of armed forces instrumentalities (such as base exchanges), who are paid with funds generated from earnings rather than congressional appropriation. *Traywick v. Juhola*, 922 F.2d 786 (11the Cir. 1991). Thus, I find jurisdiction, under the Act.

RESPONSIBLE EMPLOYER[4]

The parties agree and I find that Claimant and Employer were in an employee-employer relationship at the relevant times and the injury occurred in the course and scope of Claimant's employment. Therefore, I find U.S. Navy Exchange the responsible employer.

TIMELINESS OF NOTICE[5]

Section 912 sets out the requirements for timely notice to an employer of injury or death. 33 U.S.C. § 912. Generally, an employee has 30 days to provide notice, and the clock starts to run when reasonable diligence would have disclosed the relationship between his injury and his employment. § 912(a); 20 C.F.R. § 702.212(a). Section 920(b) establishes a presumption that sufficient notice of the claim has been given. An employer may rebut the presumption by presenting substantial evidence that it did not have knowledge of the employee's work-related injury or death. *See, Blanding v. Director, OWCP [Oldham Shipping]*, 33 BRBS 114(CRT)(2d Cir. 1999) *citing Stevenson v. Linens of the Week*, 688 F.2d 93, 98 (D.C. Cir. 1982). Failure to give timely notice may bar a claim.

Although the Employer did not receive written notice of the claimant's injury or occupational illness as required by Sections 12(a) and (b), the claim is not barred because the employer had knowledge of the claimant's work-related problems or has offered no persuasive evidence to establish it was prejudiced by the lack of written notice.[6] *Sheek v. General Dynamics Corporation*, 18 BRBS 151 (1986) (*Decision and Order on Reconsideration*), *modifying* 18 BRBS 1 (1985); *Derocher v. Crescent Wharf & Warehouse*, 17 BRBS 249 (1985); *Dolowich v. West Side Iron Works*, 17 BRBS 197 (1985). *See also* Section 12(d)(3)(ii) of the Amended Act and 20 C.F.R. § 702.216.

The Employer submitted Associate's Notice of Injury Form, dated July 26, 1995. (EX 2). The Employer also submitted Form LS-202, Employer's First Report of injury or Occupational Illness, dated September 11, 1995, reporting the Claimant's right arm was sore from an accident occurring on July 26, 1995. (EX 1). I find the Employer has submitted no evidence which

---

[4] *See* 20 C.F.R. 703.003 for requirement for employers to secure coverage or qualify as authorized self-insurers. *See* 20 C.F.R. § 702.145(f) and 33 U.S.C. § 918(b), concerning special fund relief, where the employer is insolvent or other circumstances preclude payment of benefits due. *See also Livingston v. Jacksonville Shipyards, Inc*., 31 BRBS 446 (ALJ)(1997).

[5] See 20 C.F.R. § 701.401(c) regarding certain workers and their dependents covered by state compensation acts.

[6] Failure to give timely notice does not bar a claim if the employer was not prejudiced by the delay. Section 912(d)(2). It is the employer's burden to establish prejudice. *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233, 1990 WL 284061, *5 (Ben. Rev. Board 1990). "Prejudice" means merely that the employer's ability to investigate the case has been impaired due to the delay in giving notice. *Jones Stevedoring v. Director, OWCP*, 133 F.3d 683, 31 BRBS 178 (CRT)(9th Cir. 1997).

establishes rebuttal of the presumption, under Section 920(b), that the Claimant gave timely notice of her injury.

TIMELINESS OF CLAIM

As a threshold matter, I must consider whether the Claimant timely filed her claim. A worker must file an LHWCA claim within one year after the injury. 33 U.S.C.A. § 913(a); 20 C.F.R. § 702.221. Failure to file a claim within the year may bar any right to compensation. "The time for filing a claim shall not begin to run until the employee . . . is aware, or by reasonable diligence should have been aware, of the relationship between the injury or death and the employment." *Id*. In order to determine whether the prescription has run, "we look to the employee's appreciation of the relation between his injury and his employment. For the prescription to run against him, he must know (or should know) the true nature of his condition, i.e., that it interferes with his employment by impairing his capacity to work, and its causal connection with his employment." *Marathon Oil Co. v. Lunsford*, 733 F.2d 1139, 1141 [16 BRBS 100(CRT)] (5th Cir. 1984) *but see LeBlanc v. Cooper/T. Smith Stevedoring*, No. 96-60767(5th Cir. Dec. 12, 1997)("awareness" requirement applicable only to occupational disease cases). (If voluntary payments have been made, a claim may be filed within one year of the last payment.)

It is well-settled that the employer has the burden of establishing that the claim was not timely filed. 33 U.S.C. § 920(b); *Fortier v. General Dynamics Corporation*, 15 BRBS 4 (1982), *appeal dismissed sub nom. Insurance Company of North America v. Benefits Review Board*, 729 F.2d 1441 (2d Cir. 1983); *Carlisle v. Bunge Corp.*, __BRBS__, (1999).

The Employer, in its pre-trial statement stipulates, and I find that the claim was timely filed. Claimant agreed that the claim for compensation Form LS-203 was not completed on July 26,1995; but rather, was completed when Claimant retained her attorney in March of 1997. (TR 132). Although the claim was not completed until March of 1997, I find the claim was timely filed. The Employer voluntarily paid benefits on October 30, 1995, (EX 1), until late 1997.[7] Therefore, the claim was filed within one year of the last payment.

INJURY

Section 2(2) of the LHWCA defines an "injury" as an accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. 33 U.S.C. § 902(2)*; see U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor*, 455 U.S. 608, 102 S.Ct. 1312 (1982), *rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.*, 627 F.2d 455 (D.C. Cir. 1980).

[7] The record is not clear as to when the Employer ceased voluntary payments. However, the Employer alleges in it Pre-trial Statement that Claimant reached maximum medical improvement on October 10, 1997 and Claimant's attorney stated that benefits were paid until December 29, 1997. (TR 11). On December 4, 1997, the Employer filed a Notice of Controversion of Right to Compensation and on December 29, 1997, District Director informed Claimant that any additional benefits were denied.

The claimant bears the burden of proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused the harm, in order to establish her prima facie case.[8] *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990); *U.S. Industries/Federal Sheet Metal, Inc., v. Director, OWCP*, 455 U.S. 608, 616, 102 S.Ct. 1312, 1318, 71 L.Ed. 2d 495, [14 BRBS 631](1982). An injury need not involve an unusual strain or stress; it makes no difference that the injury might have occurred wherever the employee may have been. *See Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968); *Glens Falls Indemnity co. v. Henderson*, 212 F.2d 617 (5th Cir. 1954). The claimant must establish each element of her prima facie case by affirmative proof. *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989).

Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. *Bath Iron Works Corp. v. White*, 584 F.2d 569 (1st Cir. 1978).

Once the prima facie case is established, a presumption is created under Section 20(a) of the LHWCA that the employee's injury arose out of his or her employment.[9] 33 U.S.C. § 920(a). Moreover, Section 20(d) of the Act favors the claimant with a presumption that the injury suffered was not occasioned by the willful intention of the injured employee to injure or kill herself or another. *Green v. Atlantic & Gulf Stevedores, Inc.*, 18 BRBS 116 (1986).

Once the presumption is invoked, the party opposing entitlement must present specific and comprehensive medical evidence proving the absence of or severing the connection between such harm and employment or working conditions. *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990); *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301, 305 (1989); *Conoco, Inc. v. Director, OWCP*, 33 BRBS 187 (CRT)(5th Cir. 1999); *Parsons Corp. of Cal. v. Director, OWCP*, 619 F.2d 38 (9th Cir. 1980). If an employer does not offer substantial evidence to rebut the presumption, the presumption provided by Section 20(a) will entitle the claimant to compensation.[10] *See Del Vecchio v. Bowers*, 296 U.S. 280, 284-285, 102 S.Ct. 1312, 71 L.Ed.2d 495 (1935); *Universal Maritime Corp. v. Moore & Director, OWCP*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).

The employer must rebut the presumption with substantial evidence that the claimant's

---

[8] Or, as the Board stated in *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984), that the claimant has the burden of establishing: (1) he or she sustained physical harm or pain; and, (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. But, a connection between the work and the harm need not be established at this stage. *Accord, Kelaita*, 13 BRBS at 331.

[9] This presumption applies only to the issue of whether an injury arises in the course of employment and, thus, is work-related; not to the issues of the nature and extent of disability. *Carlisle v. Bunge Corp.*, 33 BRBS 133, BRB No. 98-1604 (Sept. 13, 1999) *citing Jones v. Genco, Inc.*, 21 BRBS 12 (1998).

[10] While "substantial evidence requires 'more than a mere scintilla,' it is only 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Richardson v. Perales*, 402 U.S. 389, 410, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971); *see Sprague v. Director, OWCP*, 688 F.2d 862, 865 (1st Cir. 1982).

condition was not caused or aggravated by her employment. *Quinones v. H.B. Zachery*, 1998 WL 85580 (Ben. Rev. Bd. Feb. 10, 1998); *Manship v. Norfolk & Western Railway Co.*, 30 BRBS 175 (1996). Where aggravation of a pre-existing condition is at issue, the employer must establish that work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury.[11] *Quinones, supra; Cairns v. Matson Terminals*, 21 BRBS 252 (1988).

If the Administrative Law Judge finds the presumption is rebutted, it no longer controls and he must weigh all of the evidence and resolve the causation issue based on the record as a whole. *Devine v. Atlantic Container Lines, G.T.E.*, 25 BRBS 15 (1991). When the evidence as a whole is considered, it is the proponent (claimant) who has the burden of proof. *See, Director, OWCP v. Greenwhich Collieries*, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed.2d 221, [28 BRBS 43(CRT)(1994)].

Claimant contends that her neck injuries, right arm and left arm problems, left shoulder pain, dizziness, and extreme depression are all related to her accident on July 26, 1995. The Employer contends that the injury to her right forearm is the only work related injury Claimant suffered. Based on the October 10, 1997, Independent Medical Evaluation, the Employer further contends that Claimant's cubital ulnar nerve syndrome of the right elbow was stationary and Claimant could return to work with regard to this condition.

The evidence regarding how the Claimant was injured on July 25, 1995, is inconsistent. Claimant testified at hearing that she was on a step stool when a box fell and hit her and she fell and twisted her neck and injured her arm. Claimant signed the Associate's Notice of Injury Form, dated July 26, 1995, which stated Claimant's right forearm was sore and she was injured while moving and unpacking boxes. None of the reports in close proximity to the July 1995 injury indicate that Claimant was injured in the manner she described in her testimony at the hearing. The Claimant was examined on July 26, 1995, by Gerald Sawicki, PA-C. Mr. Sawicki reported Claimant hurt her right arm while lifting at work, and diagnosed mild tenosynovitis. Also in close proximity to her injury, on July 27, 1995, Dr. Bethel reported the July 26, 1995 accident was a new occurrence and diagnosed tenosynovitis in the right forearm secondary to overuse syndrome. In October of 1995, Dr. Scheyer reported Claimant had an overuse injury. In November of 1995, Dr. Nacht reported Claimant developed pain in her right elbow in July of 1995 and had a repetitive type injury, with tendinitis in her right forearm and wrists. In December of 1995, Dr. Nacht diagnosed hypermobile ulnar nerves due in part to repetitive tasks at work. In May of 1996, Dr. Grow reported Claimant developed pain in her arm in 1995. In June of 1996, Dr. Ma reported Claimant had to move and unpack boxes and squeeze a price gun and developed soreness in her right forearm. In September of 1996, Dr. Simon noted Claimant had right arm problems related to work activities in the summer of 1995 and reported Claimant denied any particular injury. (*Emphasis added*). In September of 1996, Dr. Simon attributed Claimant's pain in her right arm to a repetitive strain type of injury. Of the physicians who treated the Claimant

[11] In *Fargo v. Campbell Industries*, 9 BRBS 766 (1978), the Board affirmed an award of permanent total disability benefits, stating the aggravation of a pre-existing arthritic condition by a work-related injury was completely compensable under the LHWCA.

from the time of her injury in July 1995, through September of 1996, none reported boxes falling on Claimant. The physicians diagnosed a repetitive type injury to her arm.

Not until approximately one year after the accident, do the records reflect that Claimant was injured when boxes fell on her. The claim of boxes falling and injuring the Claimant, as she testified at the hearing, does not appear in the records until late 1996 early 1997. On her claim Form LS-203 dated March 1997, she alleged that she was injured when a shelf fell with boxes on top of it fell and that she picked up tables and couches. In October of 1996, Dr. Greenwald reported shelves falling on Claimant one month before the reported original injury. On May 6, 1997, in the records from Teton MRI, Claimant claimed to be injured when boxes fell down on her from the top shelf. On June 4, 1997, Dr. Biddulph reported Claimant had an accident in July 26, 1995 when boxes fell on top of her shoulder and upper extremities. On March 27, 1998, Dr. Walker reported Claimant was injured at work in July of 1995 while lifting and she heard a snap in her right upper extremity. Dr. Walker noted a second injury when Claimant fell at work. In September of 1999, Dr. McCollum reported Claimant was injured when she put a box on a shelf and it started to fall, and she backed up and fell down.

Between the time of the reported accident in July of 1995 up until late 1996, early 1997, none of the records, physicians' reports, or forms indicated that the Claimant was injured when a box fell on her from a shelf and she fell. Between the time of the injury and early 1997, Claimant saw many health care professionals and physicians, Mr. Sawicki, Dr. Bethel, Dr. Scheyer, Dr. Nacht, Dr. Grow, Dr. Ma, and Dr. Simon, and no one reported the accident occurring as the Claimant testified. Not until approximately one year after the accident, do the records reflect that Claimant was injured when a box or a shelf fell on her. I find the reports in closest proximity to the July 1995 injury the most reliable and accurate. Based on the inconsistencies in Claimant's testimony with the multiple inconsistent doctors' reports, I do not find Claimant's testimony credible on the cause of the accident.

Counsel for the Claimant argues in his closing brief that Claimant complained of neck pain to the first two doctors she saw after her injury, citing CX 7 and CX 8. However, Counsel does not cite the relevant doctors and does not note their conclusions. On August 16, 1995, Gerald Sawicki, PA-C, for Dr. Bethel, noted "she has a little soreness to the right cervical musculature down into the trapezius but nothing severe." (CX 7).

Based on a review of the medical records, the doctors did not report Claimant complaining of serious neck pain until almost one year after her July 26, 1995 work injury. On May 17, 1996, Dr. Grow reported Claimant suffered pain with shoulder movement and experienced pain in her neck with cervical spine motions. An MRI dated September 27, 1996, revealed a disc herniation at C5-6 level. On October 28, 1996, Dr. Hill diagnosed herniated discs of the cervical spine and noted Claimant was unsure of the exact time of the injury. (CX 17). On October 16, 1996, Dr. Greenwald reported Claimant complained of neck pain. Dr. Greenwald found severely degenerated disc at C6-7 and a degenerative disc at C5-6. Based on a review of the records, Claimant did not report her neck problems until approximately one year after the work accident. Therefore, I find insufficient evidence invoke the presumption that Claimant's

neck injuries are related to her work injury.

I also do not find that Claimant's shoulder injury was related to her work accident. Claimant did not report experiencing shoulder pain until May of 1996. On May 17, 1996, Dr. Grow reported Claimant had pain radiating into her right hand, elbow and up into her shoulder. In June of 1996, Dr. Greenwald noted Claimant suffered pain in her neck and right shoulder. On June 27, 1996, Dr. Ma reported Claimant experienced pain in her shoulder. On May 6, 1997, Dr. Meriam interpreted an MRI as suspicious for full-thickness tear of anterior aspect of the supraspinatus tendon. On May 8, 1997, Dr. Simon diagnosed right shoulder pain and a torn supraspinatus tendon. In June of 1997, Dr. Biddulph reported Claimant had an accident when boxes fell on top of her shoulder and outstretched upper extremities, and diagnosed a rotator cuff tear. Drs. Phillips and Hammond found Claimant rotator cuff surgical repair on June 24, 1997, on a more probable than not basis was precluded by an unrelated pre-existing condition in the shoulder, not related to her work incident. As discussed above, Claimant did not complain of a shoulder injury from boxes falling on her until a year after the incident. Therefore, I do afford Claimant's testimony much weight. Because I do not credit Claimant's testimony, I do not find that Dr. Biddulph and Dr. Greenwald were given accurate information in order to diagnose the cause of Claimant's neck and shoulder injuries. Therefore I do not afford their opinions great weight because the doctors relied on Claimant's description of boxes falling on her when they formed their opinions.

After analyzing the evidence of record, I find that Claimant has not met her burden of proving that her neck and shoulder injuries were caused by her working conditions. Claimant did not suffer from neck and shoulder pain until approximately a year after her work accident. Claimant only worked a few weeks after the accident and was off work during a majority of the time and was not exposed to harmful working conditions to aggravate her injury. Dr. Greenwald did not examine Claimant until a year after her work injury. Furthermore, after her disc surgery, Dr. Greenwald found severely degenerated disc at C6-7 and a degenerative disc at C5-6. Dr. McCollum, Board-certified in orthopaedic surgery found no relationship between Claimant's neck or shoulder problems to the work accident. Dr. Phillips, Board-certified in orthopaedic surgery and Dr. Hammond, Board-certified in neurology opined that Claimant's cervical discectomy and fusion performed on December 10, 1996, was related to the natural progression of documented pre-existing degenerative disease of the cervical spine and in no way the result of her reported work activity in 1995. Claimant also complained of more neck pain after her automobile accident in July 1997, where she suffered an acute neck strain and whiplash type of injury. Therefore, I find Claimant has not invoked the Section 20(a) presumption that her neck and shoulder injuries were related to work.

I find that Claimant's repetitive type injuries of her right ulnar nerve, right wrist, right elbow, and right forearm problems were related to the July 26, 1995 incident. As to the cause and location of Claimant's injuries, I afford the most weight to the doctors' who examined the Claimant following her work injury in 1995. On July 26, 1995, Gerald Sawicki, PA-C, reported Claimant hurt her right arm while lifting at work and he diagnosed mild tenosynovitis. In August of 1995, Dr. Bethel reported he was treating Claimant for a work related injury and diagnosed tenosynovitis of the right forearm. In October of 1995, Dr. Scheyer diagnosed acute

tenosynovitis and acute lateral epicondylitis of the right elbow and tenosynovitis of the right wrist due to an overuse injury. In December of 1995, Dr. Nacht opined that Claimant's condition was related in part to work and in part to her hypermobile ulnar nerves which were made symptomatic by her repetitive tasks on the job at the Navy Exchange. On an electrodiagnostic report dated December 4, 1995, Dr. Steinitz reported Claimant had an ulnar motor and sensory slowing across the elbow segment, mild right ulnar neuropathy, significant ulnar nerve conduction velocity slowing across the elbow segment, and on the left side he noted mild ulnar sensor amplitude loss. Dr. Nacht performed right ulnar nerve transposition surgery on December 22, 1995. Based on the doctors' reports from July of 1995 through December of 1995, I find that Claimant has shown the existence of an injury that was the result of a work related accident or condition and has invoked the presumption under Section 20(a) that the injury arose out of her employment. Dr. Phillips, Board-certified in orthopaedic surgery and Dr. Hammond, Board-certified in neurology, found that Claimant's right ulnar nerve neurolysis and anterior transposition was the direct result of her work activity on July 26, 1995.

I find that the employer has not presented specific and comprehensive medical evidence proving the absence or severing the connection between Claimant's right forearm, wrist, and elbow injuries and her working conditions.

I do not find Claimant's dizziness related to her work injuries. Claimant was in a car accident on July 8, 1997 and was diagnosed with an acute neck strain. Claimant testified that she experienced severe dizziness and headaches after the July 1997 car accident. (TR 77-78, 105). Furthermore, various doctors did not report that Claimant experienced dizziness until after she was involved in the automobile accident in July of 1997. On January 21, 1998, Audiologist Susannah DeMill reported Claimant experienced a spinning sensation and a feeling of being off balance which started after she was involved in an automobile accident. On June 29, 1998, Dr. Walker reported that after a motor vehicle accident in July of 1997, Claimant experienced dizziness. The earliest report of record of Claimant experiencing dizziness was from Dr. Hill in November of 1996, which was related to her herniated disc injury. Therefore, I do not find Claimant has invoked the Section 20(a) presumption that her dizziness was the result of her work related accident.

Claimant alleges that her psychological problems are related to her work accident. It is well established that a psychological impairment which is work related is compensable under the Act. *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 22 BRBS 340 (1989); *Turner v. Chesapeake and Potomac Telephone Co.*, 16 BRBS 255 (1984). Furthermore, the Section 20(a) presumption is applicable in psychological injury cases. *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380, 384 n.2 (1990). Claimant's psychological injury <u>need only be due in part to work related conditions</u> to be compensable under the Act. *(Emphasis added), Sewall v. Noncommissioned Officers' Open Mess, McChord Air Force Base*, 32 BRBS 127 (1998), *citing, Peterson v. General Dynamic Corp.*, 25 BRBS 78 (1991).

A professional counselor, Alice Guyer, diagnosed Claimant with mood disorder due to major depressive episodes, underweight, shoulder pain, neck and arm problems, medical and occupational problems. Ms. Guyer opined Claimant experienced anxiety and depression because

of her injuries. Drs. Phillips and Hammond, opined that Claimant's symptoms are pain related. Dr. Walker opined that Claimant had significant psychological overlay to her symptoms with chronic pain syndrome. Dr. Walker noted Claimant complained of pain in her neck, elbow, fingers, hands and arms. On July 9, 1996, Dr. Nacht reported Claimant had continued problems with her right arm due to neuritis in the ulnar nerve and hypersensitivity in the elbow, forearm and hand. Dr. Nacht opined that Claimant's condition was not fixed and stable and that she suffers from sleep disorder, depression, severe discomfort in her right arm and chronic pain management dilemma. On July 24, 1996, Dr. Nacht reported Claimant's husband called concerned about his wife expressing suicidal tendencies. Dr. Nacht recommended Claimant see a psychotherapist. On May 17, 1996, Dr. Grow noted that Claimant complained of pain in her arms, neck and shoulder. Dr. Grow opined that Claimant's signs and symptoms are related to the industrial injury and that there is a considerable psychological overlay. Dr. Grow found the Claimant was not fixed and stable. Dr. Simon opined that Claimant possibly had sympathetic mediated pain syndrome and that her complaints of pain are out of proportion to her injury. On his physical therapy evaluation, Mr. Pearson noted Claimant suffers constant and chronic pain in her fingers and hand. Mr. Pearson reported that pain has been the major barrier to Claimant's rehabilitation. On January 31, 1997, Dr. Greenwald recommended a counselor because Claimant called him, complaining of pain in her arms and neck spasms, and she stated that she thought about harming herself. On March 19, 1998, Dr. Greenwald reported Claimant had pain in her arm, neck and shoulder and that she was very depressed about her injuries. Dr. Cobiella reported Claimant's physical therapist referred her for evaluation of depression.

Based on the numerous reports that Claimant has psychological problems stemming from her chronic pain syndrome which the doctors relate to her work injury of her arm, her neck and shoulder problems, I find that Claimant has invoked the Section 20(a) presumption that her work related injuries contributed to her psychological problems.

Based on the evidence, I find that Claimant has invoked the Section 20(a) presumption as to establishing that a condition existed at work which could have caused Claimant's right wrist, hand, and forearm problems from a repetitive injury. Furthermore, I find that her work injuries contributed to her psychological problems, depression and chronic pain syndrome. The employer has not presented specific and comprehensive medical evidence proving the absence or severing the connection between Claimant's right arm injuries and her psychological problems and employment However, I do not find that the Claimant has met her burden to invoke the presumption, under Section 20(a), that her neck injury, shoulder injury, rotator cuff injury, left arm injury and dizziness arose out of the Claimant's employment.

DISABILITY

Section 2(10) of the LHWCA defines "disability" as the incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment. 33 U.S.C. § 902(10). In order for a claimant to receive disability benefits, she must have an economic loss coupled with a physical or psychological impairment. *Sproull v. Stevedoring Services of America*, 25 B.R.B.S. 100, 110 (1991); *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Owens v. Traynor*, 274 F. Supp. 770 (D.Md. 1967), *aff'd*, 396 F.2d 783 (4th

Cir. 1968), *cert. denied*, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. *Nardella v. Campbell Machine, Inc.*, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. *American Mutual Insurance Company of Boston v. Jones*, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (*Id*. at 1266).

The claimant bears the initial burden of establishing the nature and extent of any disability sustained as a result of a work-related injury without the benefit of the Section 20 presumption. *Lombardi v. Universal Maritime Service*, 32 BRBS 83 (1998); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985); and, *Hunigman v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 141 (1978). However, once the claimant has established that he is unable to return to her former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir. 1981); *Air America v. Director*, 597 F.2d 773 (1st Cir. 1979); *American Stevedores, Inc. v. Salzano*, 538 F.2d 933 (2d Cir. 1976); *Preziosi v. Controlled Industries*, 22 BRBS 468, 471 (1989); *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984).

1. EXTENT OF DISABILITY - TOTAL vs. PARTIAL

A claimant has the burden of proving a *prima facie* case of total disability by showing she cannot return to her regular employment due to a work-related injury. *Trask v. Lockheed Shipbuilding Co.*, 17 BRBS 56, 59 (1980). At the initial stage, a claimant need not establish she cannot return to *any* employment, only that she cannot return to her former employment. *Elliot v. C & P Tel. Co.*, 16 BRBS 89 (1984); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988)(due to permanent restrictions against heavy lifting and excessive bending, employee could not resume usual job as sandblaster).

The Judge must compare the claimant's medical restrictions with the specific requirements of her usual employment. *Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988). In doing so, an Administrative Law Judge is not bound to accept the opinion of any particular witness but rather, is entitled to weigh the credibility of all witness, including doctors, and draw his own inferences from the evidence. *Lombardi v. Universal Maritime Service*, 32 BRBS 83 (1998). The Board held, in *Lombardi*, that the credited medical opinion of a claimant's treating orthopedic surgeon, in connection with the claimant's testimony regarding his job requirements, constituted substantial evidence in support of a determination that the claimant's impairment prevented him from performing his usual employment duties. *Id*.

A claimant's credible complaints of pain alone may be enough to meet her burden. *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Richardson v. Safeway Stores*, 14 BRBS 855 (1982); *Miranda v. Excavation Construction*, 13 BRBS 882, 884 (1981). However, a

judge may find an employee able to do his ususal work despite complaints of pain, numbness, and weakness, when a physician finds no functional impairment. *Peterson v. Washington Metro Area Transit Authority*, 13 BRBS 891 (1981).

I find that Claimant has met her burden of showing that she is unable to perform her usual employment with regard to her right arm problems. In the most recent report of record dated September 9, 1999, Dr. McCollum found Claimant had no evidence of impairment of her ulnar subluxations or of her right shoulder condition. However, Dr. McCollum did not analyze Claimant's job duties and did not render an opinion on whether she was physically and mentally capable of performing her usual job duties. Therefore, I do not give his opinion much weight.

In March of 1998, Dr. Walker, found Claimant had limited grip strength and pinch strength and found Claimant could only tolerate sedentary or very light duty work without repetitive motion at the elbows. On October 10, 1997, Dr. Phillips, Board-certified in orthopaedic surgery and Dr. Hammond, Board-certified in neurology, found that Claimant's right ulnar nerve neurolysis and anterior transposition was the direct result of her work activity in July of 1995. Drs. Hammond and Phillips found some of the requirements of Claimant's job as a cashier or clerk outside of her limitations and found her unable to return to that job.

In June of 1996, Dr. Ma reported Claimant's right cubital tunnel syndrome, right forearm pain, hand pain and wrist pain related to her work injury and found that Claimant's condition was not fixed and stable. Dr. Ma opined that Claimant is not likely to have further damage to her right arm if she continues to have modified work. In May of 1996, Dr. Grow noted Claimant's symptoms are related to her industrial injury with a considerable psychological overlay and opined that Claimant is not fixed and stable, but could return to work for two hours a day. Drs. Simon and Greenwald documented continuing arm pain due to a repetitive strain. Mr. Pearson, a physical therapist reported constant and chronic pain in Claimant's fingers and hands. In March 1996, Terry Moon and Stephen Winter submitted a Performance-Based Functional Capacities Evaluation which revealed Claimant performed at a sedentary level of work and found Claimant could work at modified work. On July 9, 1996, Dr. Nacht reported Claimant had continued problems with her right arm due to neuritis in the ulnar nerve and hypersensitivity in the elbow, forearm and hand.

Based on the above, I do not find that Claimant is able to perform her usual job duties as cashier or checker at the Navy Exchange which required her to frequently lift items on to shelves, unpack boxes and work as a clerk. The employer submitted the report by Drs. Hammond and Phillips who found that some of Claimant's job duties as a clerk were outside her limitations and found her unable to return to that job. Dr. Walker found Claimant could only tolerate sedentary work without repetitive motion. Drs. Ma and Grow also found that Claimant's condition was not fixed and stable and Dr. Ma recommended modified work. The performance evaluation report submitted in 1996 also recommended modified work. Therefore, I do not find Claimant is able to perform her usual employment duties.

I find that Claimant has also met her burden of showing that she is unable to return to her former employment due to her psychological problems and chronic pain management problems

related to her work injuries. The doctors' reports indicate that the Claimant's major obstacle in returning to work is her inability to deal with pain. In Dr. McCollum's report dated September 9, 1999, he found no evidence of any impairment of Claimant's ulnar subluxations and found no impairment from her shoulder condition. However, Dr. McCollum did not analyze Claimant's usual employment duties and did not render an opinion on Claimant's mental state. Therefore, I do not give his opinion much weight. In March of 1998, Dr. Walker opined that Claimant had limited grip strength, suffered from ulnar nerve symptoms and has significant psychological overlay to her symptoms with a difficulty coping with pain. Dr. Walker opined that it would be extremely difficult for Claimant to ever return to productive work without a chronic pain management program and recommended very light duty without repetitive motion at the elbows.

In March of 1998, Dr. Greenwald reported Claimant had weakness in her arm, pain and was depressed. Drs. Hammond and Phillips found that Claimant's symptoms are pain-behavior related. Dr. Nacht and Dr. Grow found Claimant's condition was not fixed and stable and that she suffered from chronic pain management dilemma with a considerable psychological overlay. In addition, in July of 1996, Dr. Nacht reported Claimant's husband called concerned about his wife expressing suicidal tendencies and in January of 1997, Dr. Greenwald reported Claimant thought about harming herself. A professional counselor, Alice Guyer, diagnosed Claimant with mood disorder due to major depressive episodes, shoulder pain, neck and arm problems, medical and occupational problems.

On the basis of the record provided, I conclude that the claimant has established that she cannot return to work as a cashier / clerk due to injuries suffered on July 26,1995.

Suitable Alternate Employment

Once the claimant meets her *prima facie* showing that she cannot return to her usual work, the burden shifts to the employer to show suitable alternative employment or realistic job opportunities in the relevant geographic market which the claimant is capable, e.g., physically and educationally qualified, of performing and which she could secure if she diligently tried.[12] *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988); *Palombo v. Director, OWCP*, 937 F.2d 70, 73, 25 BRBS 1(CRT) (2d Cir. 1991); *Director, OWCP v. Bethlehem Steel Corp.*, 949 F.2d 185, 25 BRBS 90(CRT) (5th Cir. 1991); *Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980), *aff'g Hansen v. Bumble Bee Seafoods*, 7 BRBS 680 (1978); *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. Sub. nom., Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993); *McCabe v. Sun Shipbuilding & Dry Dock Co.*, 602 F.2d 59, 10 BRBS 614 (3rd Cir. 1979) *aff'g in pertinent part* 7 BRBS 333 (1977); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 592 F.2d 762, 765 10 BRBS 81, 86-87 (4th Cir. 1979); *American Stevedores, Inc., v. Salzano*, 538 F.2d 933, 4 BRBS 195 (2d Cir. 1976) *aff'g* 2 BRBS 178 (1975); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 131 (1990);

[12] Once it is found an employer has not established the availability of suitable alternate employment, the issue of whether the claimant diligently sought work need not be addressed. *Carlisle v. Bunge Corp*., 33 BRBS 133, BRB No. 98-1604 (Sept. 13, 1999) n. 15, *citing Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22 (1988); *Williams v. Halter Marine Service, Inc*., 19 BRBS 248 (1987).

Pilkington v. Sun Shipping & Drydock Co., 9 BRBS 476, 477 (1978); *Sam v. Loffland Brothers Co.*, 19 BRBS 228 (1987); and, *see Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 542 (4th Cir. 1988). The relevant geographic market or the claimant's local community has been interpreted to mean the community in which the injury occurred. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir. 1981); *Jameson v. Marine Terminals*, 10 BRBS 194 (1979).[13]

While the claimant generally need not show that she has tried to obtain employment, *Shell v. Teledyne Movible Offshore, Inc.*, 14 BRBS 585 (1981), she bears the burden of demonstrating his willingness to work, *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199 (4th Cir. 1984), once suitable alternative employment is shown. *Wilson v. Dravo Corporation*, 22 BRBS 463, 466 (1989); *Royce v. Elrich Construction Company*, 17 BRBS 156 (1985).

Moreover, although a claimant relocates for personal reasons, employer can still meet its burden of establishing suitable alternate employment if it shows that such jobs are available within the geographical area in which claimant resided at the time of the injury. *McCullough v. Marathon LeTourneau Company*, 22 BRBS 359, 366 (1989); *Dixon v. John J. McMullen and Associates*, 19 BRBS 243 (1986); *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984).

The employer need not show an actual job offer but must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *Trans-State Dredging v. Benefits Review Board (Tarner)*, 731 F.2d 199, 16 BRBS 74 (CRT)(4th Cir. 1984). For the job opportunities to be realistic, however, the employer must establish their precise nature, terms, and availability. *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94, 97 (1988); *Piunti v. ITO Corp. of Baltimore*, 23 BRBS 367, 379 (1990). A failure to prove suitable alternative employment results in a finding of total disability. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989); *American Stevedores v. Salzano*, 538 F.2d 933, 935 (2d Cir. 1976). If the employer establishes the existence of such employment, the employee's disability is treated as partial, not total. *Palombo; Rinaldi v. General Shipbuilding Co.*, 25 BRBS 128 (1991); *Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544 (9th Cir. 1991). The claimant may rebut an employer's showing of alternative employment by demonstrating that he diligently tried but was unable to secure such employment. *Palombo*; *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540 (4th Cir. 1988)(and retain eligibility for total disability benefits); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687 (5th Cir.), *cert. den.*, 479 U.S. 826 (1986).

In order to meet the burden of showing the availability of suitable alternative employment, the employer need not contact prospective employers to inform them of the qualifications and limitations of a claimant and to determine if they would, in fact, consider hiring the candidate for

[13] So, available job positions sixty-five and two-hundred miles from the claimant's residence are not considered within the local community, even if the claimant took such jobs before the injury occurred. *Kilsby v. Diamond M. Drilling Co.*, 6 BRBS 114 (1977); *Diamond M. Drilling Co. v. Marshall*, 577 F.2d 1003, 8 BRBS 658 (5th Cir. 1978).

their position. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 542 (4th Cir. 1988). Likewise, an employer may meet its burden by demonstrating the availability of specific jobs in a local market and rely on standard occupational job descriptions to fill out the qualifications for performing such jobs without contacting prospective employers for the specific requirements in order to establish a valid vocational survey. *Universal Maritime Corp., v. Moore & Director, OWCP*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).

A job provided by employer may constitute evidence of suitable alternative employment if the tasks performed are necessary to employer, *Peele v. Newport News Shipbuilding & Dry Dock*, 18 BRBS 224, 226 (1987), and if the job is available to claimant. *Wilson v. Dravo Corp.*, 22 BRBS 463, 465 (1989); *Beaulah v. Avis Rent-A-Car*, 19 BRBS 131, 133 (1986).[14]

Betty Cross, certified disability management specialist and rehabilitation counselor submitted a vocational evaluation report dated November 14, 1997. Ms. Cross relied on the physical restrictions noted by Dr. Phillips, and interviewed the Claimant and her husband. Ms. Cross opined that Claimant continued to experience physical symptoms and it may be difficult for her to actively participate in a job search. On January 16, 1998, Ms. Cross submitted a status report in which Dr. Simon approved the Job Analyses with restrictions on the teacher aide

position in that Claimant should rarely lift 20-25 pounds, but can frequently lift up to ten pounds. Ms. Cross also reported Navy Exchange had a cashier position open.

The employer called Merrill Cohen, a vocational rehabilitation counselor, at the hearing. Considering Claimant's age, medical restrictions, skills, education, and employment history. Ms. Cohen identified jobs available in the Pocatello area in September of 1999 as a customer service representative, desk clerk, sales associate and a receptionist. Ms. Cohen referred to Dr. Walker's March 27, 1998 report for Claimant's physical restrictions and limitations. Ms. Cohen testified that she had a detailed description of the job, physical demands, minimum qualifications, responsibilities, wage, and discussed the Claimant's background with the employers. Ms. Cohen did not discuss that the Claimant may have to lay down two to four times per day.

The claimant may rebut an employer's showing of alternative employment by demonstrating that he diligently tried but was unable to secure such employment. *Palombo*; *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540 (4th Cir. 1988)(and retain eligibility for total disability benefits); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687 (5th Cir.), *cert. den.*, 479 U.S. 826 (1986). I find that Claimant has rebutted employer's showing of alternate employment by diligently trying to secure employment recommended by the employer. Claimant testified that she went to several interviews but never

---

[14] An employer is not actually required to place a claimant in alternate employment, and the fact that an employer does not identify suitable alternative employment until the day of the hearing does not preclude a finding that the employer has met its burden. *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 236-237 n.7 (1985). Nonetheless, the Administrative Law Judge may reasonably conclude that an offer of a position within employer's control on the day of the hearing is not bona fide. *Diamond M Drilling Co. v. Marshall*, 577 F.2d 1003, 1007-9 n.5, 8 BRBS 658, 661 n.5 (5th Cir. 1979); *Jameson v. Marine Terminals*, 10 BRBS 194, 203 (1979). Nor does an employer satisfy this test by pointing to the only one internal light-duty job the claimant held prior to a layoff unrelated to his disability. *Norfolk Shipbuilding & Dry Dock Corp. v. Hord*, 33 BRBS 170(CRT)(4th Cir. 1999).

received a job offer. Claimant's husband testified that his wife attempted to interview at all of the places the Crawford representative recommended, but none of the employers called her back. Furthermore, Claimant has demonstrated that she is willing to work and attempted to return to work after her injury. On May 1, 1996, Dr. Nacht gave his tentative approval for Claimant to return to work with limitation, and released her to work four hours per day three days a week for two weeks. On May 6, 1996, Dr. Nacht found Claimant unable to return to work. On May 14, 1996, Dr. Nacht reported Claimant returned to work for two of her three assigned days and then took a week off because of her symptoms.

On the basis of the totality of this record, I find and conclude that the Claimant has established that she cannot return to work as a clerk or cashier. The burden thus rested upon the employer to demonstrate the existence of suitable alternative employment in the area. If the employer does not carry this burden, the claimant is entitled to a finding of total disability. *American Stevedores, Inc. v. Salzano*, 538 F.2d 933 (2d Cir. 1976); *Southern v. Farmers Export Company*, 17 BRBS 64 (1985). The Employer identified several jobs in the Pocatello area which meet the Claimant's qualifications. However, Claimant interviewed for the jobs and was unable to secure employment. The jobs the Employer recommended did not take into account Claimant's psychological problems and need to rest several time a day. Even assuming that the Employer established suitable alternate employment, Claimant has rebutted the employer's evidence of suitable alternative employment by showing she diligently tried but was unable to secure such employment.

2. NATURE OF DISABILITY - PERMANENT vs. TEMPORARY

A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *General Dynamics Corporation v. Benefits Review Board*, 565 F.2d 208 (2d Cir. 1977); *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989); *Trask v. Lockheed Shipbuilding and Construction Company*, 17 BRBS 56 (1985); *Mason v. Bender Welding & Machine Co.*, 16 BRBS 307, 309 (1984).

The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." An injured worker's impairment may be found to have changed from temporary to permanent if and when the employee's condition reaches the point of "maximum medical improvement" or "MMI."[15] *James v. Pate Stevedoring Co.*, 22 BRBS 271, 274 (1989); *Phillips v. Marine Concrete Structures*, 21 BRBS 233, 235

[15] If a claimant shows he is disabled under the Act and MMI has not been reached, the appropriate remedy is an award of temporary total or partial disability, under Section 8(b) or (e). *Carlisle v. Bunge Corp.*, 33 BRBS 133, BRB No. 98-1604 (Sept. 13, 1999) *n. 10, citing* 33 U.S.C. § 908(b) and *Hoodye v. Empire/United Stevedores*, 23 BRBS 341 (1990).

(1988); *see SGS Control Services v. Director, OWCP*, 86 F.3d 438, 443-44 (5th Cir. 1996); *Director, OWCP, v. Berkstresser*, 921 F.2d 306, 312 (D.C. Cir. 1991). Any disability before reaching MMI would be temporary in nature. *Id*.

The determination of when maximum medical improvement is reached, so that a claimant's disability may be said to be "permanent," is primarily a question of fact based on medical evidence. *Lozada v. Director, OWCP*, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989); *Care v. Washington Metropolitan Area Transit Authority*, 21 BRBS 248 (1988); *Wayland v. Moore Dry Dock*, 21 BRBS 177 (1988); *Eckley v. Fibrex and Shipping Company*, 21 BRBS 120 (1988); *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979).

The date of maximum medical improvement is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a claimant's condition becomes permanent is primarily a medical determination, regardless of economic or vocational considerations. *Manson v. Bender Welding & Machine Co.*, 16 BRBS 307, 309 (1984); *Louisiana Insurance Guaranty Association v. Abbott*, 40 F. 3d 122 (5th Cir. 1994); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988). Medical evidence must establish the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56, 60 (1985). A date of permanency may not be based, however, on the mere speculation of a physician. *See Steig v. Lockheed Shipbuilding & Construction Co.*, 3 BRBS 439, 441 (1976). Furthermore, evidence of the ability to do alternate employment is not relevant to the determination of permanency. *Berkstresser v. Washington Metro. Area Transit Authority*, 16 BRBS 231, 234 (1984), *rev'd on other grounds sub nom., Director, OWCP v. Berkstresser*, 921 F.2d 306 (D.C. Cir. 1990).

An Administrative Law Judge must make a specific factual finding regarding maximum medical improvement, and cannot merely use the date when temporary total disability is cut off by statute. *Thompson v. Quinton Engineers*, 14 BRBS 395, 401 (1985). In the absence of any other relevant evidence, the judge may use the date the claim was filed. *Whyte v. General Dynamics Corp.*, 8 BRBS 706, 708 (1978).

Where the medical evidence indicates that the worker's condition is improving and the treating physician anticipates further improvement in the future, it is not reasonable for a judge to find that maximum medical improvement has been reached. *Dixon v. John J. McMullen & Assocs.*, 19 BRBS 243, 245 (1986). Similarly, where a treating physician stated that surgery might be necessary in the future and that the claimant should be reevaluated in several months to check for improvement, it was reasonable for the Administrative Law Judge to conclude the claimant's condition was temporary rather than permanent. *Dorsey v. Cooper Stevedoring Co.*, 18 BRBS 25, 32 (1986), *pet. dismissed sub nom., Cooper Stevedoring Co. v. Director, OWCP*, 826 F.2d 1011 (11th Cir. 1987); *Kuhn v. Associated Press*, 16 BRBS 46, 48 (1983).

Permanent disability has been found where little hope exists of eventual recovery, *Air America, Inc. v. Director, OWCP*, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, *Meecke v. I.S.O. Personnel Support Department*, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, where work within claimant's work restrictions is not available, *Bell v. Volpe/Head Construction Co.*, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone.[16] *Eller and Co. v. Golden*, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, *Ballard v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 676 (1978); *Ruiz v. Universal Maritime Service Corp.*, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. *Bell, supra*. *See also Walker v. AAF Exchange Service*, 5 BRBS 500 (1977); *Swan v. George Hyman Construction Corp.*, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability. *Mendez v. Bernuth Marine Shipping, Inc.*, 11 BRBS 21 (1979); *Perry v. Stan Flowers Company*, 8 BRBS 533 (1978).

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. *Meecke v. I.S.O. Personnel Support Department*, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. *Exxon Corporation v. White*, 617 F.2d 292 (5th Cir. 1980), *aff'g* 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. *Fleetwood v. Newport News Shipbuilding and Dry Dock Company*, 16 BRBS 282 (1984), *aff'd*, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985); *Watson v. Gulf Stevedore Corp., supra*..

It is undisputed that Claimant had a repetitive type injury aggravated by work. However, the Claimant and Employer dispute whether the Claimant has recovered from this injury or whether she is disabled and has reached maximum medical improvement. The reports of record are unclear as to whether Claimant has reached maximum medical improvement or has recovered from her repetitive injury. Shortly after her injury date in July of 1995, Dr. Nacht diagnosed

---

[16] Claimant's credible testimony of the constant pain endured while performing work activity may constitute a sufficient basis for an award notwithstanding considerable evidence the claimant can perform certain types of work activity. *Mijangos v. Avondale Shipyards, Inc*., 948 F.2d 941, 25 BRBS 78 (5th Cir. 1991).

hypermobile ulnar nerves, which were symptomatic by her repetitive tasks. Claimant had a right ulnar nerve transposition surgery on December 22, 1995. Dr. Nacht reported Claimant was slow at recovering from the surgery. In May of 1996, Dr. Nacht reported Claimant returned to work and took a week off due to pain in her hands. In June of 1996, Dr. Ma stated Claimant's condition was not fixed and stable and will require further observation. Eventually, in July of 1996, Dr. Nacht recommended Claimant stay off work indefinitely and that her condition is not fixed and stable. In September of 1996, Dr. Simon diagnosed a repetitive strain injury and symptoms in the ulnar nerve and right arm pain. Dr. Greenwald also reported an ulnar transposition can be done on both elbows, with the success about 60%.

In September of 1999, Dr. McCollum found no evidence of any impairment of her ulnar subluxations on both sides. In March of 1998, Dr. Walker noted that Claimant's right ulnar nerve moved back into its ulnar grove and the Claimant suffered symptoms and had limited grip and pinch strength. In October of 1997, Drs. Phillips and Hammond opined that Claimant could return to her previous work activity as a cashier in regard to the right ulnar nerve cubital syndrome.[17]

Dr. McCollum did not render an opinion on Claimant's psychological state. In March of 1998, Dr. Walker opined that Claimant had significant psychological overlay to her symptoms with difficulty coping with pain and chronic pain syndrome. Dr. Walker opined that it would be extremely difficult for Claimant to ever return to productive work without a chronic pain management program and he recommend a psychiatrist. In September 1997, professional counselor Ms. Guyer opined that Claimant experienced a lot of depression because of her injuries. Ms. Guyer does not render an opinion as to whether Claimant has reached maximum medical improvement or if further counseling would help Claimant. Although Dr. Greenwald noted Claimant was depressed due to her injuries and recommended a counselor, he did not opine as to whether she has reached maximum improvement. In September of 1996, Mr. Pearson, Claimant's physical therapist reported that Claimant's pain has been the major barrier to her rehabilitation. On September 4, 1996, Dr. Simon reported Claimant's complaints of pain seem to be out of proportion to her injury. In May of 1996, Dr. Grow stated that Claimant's problems were related to her work injuries with a considerable psychological overlay. Dr. Grow concluded that Claimant was not fixed and stable and that it was too soon to rate her.

On the basis of the totality of the record, I find the medical evidence is not sufficient to find Claimant has reached maximum medical improvement. Although Claimant's symptoms have been ongoing since July of 1995, her difficulties stem from an array of physical and psychological problems, some of which are unrelated to her original work injury. The various reports of record are unclear as to whether Claimant has reached maximum medical improvement in her arm injuries or psychological condition. As to her psychological problems, several doctors recommended a chronic pain management program before Claimant can return to work. In regard to her psychological problems, I find that Claimant has not reached maximum medical improvement and is temporarily disabled. Claimant submitted only one counselor's report from September of 1997

[17] However, the doctors found that with Claimant's multiple problems, there were some requirements of Claimant's last job that were outside her limitations.

stating that the Claimant was depressed due to her injuries. As stated above, I found that some of Claimant's psychological problems related to her July 1995 injury. Therefore, I find the Employer responsible for Claimant's treatment for her psychological problems.

In conclusion, based on the various medical opinions that Claimant's condition is not fixed and stable and doctors' recommendations for counseling on pain management, I find that the Claimant is entitled to temporary total disability benefits until such time it is found that she can physically and psychologically return to work or such time as she can establish that she is permanently disabled.

MEDICAL EXPENSES AND BENEFITS

Section 7(a) of the LHWCA provides that "[t]he employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a); *see also* 20 C.F.R. § 702.401. In order for a claimant to receive medical expenses, his injury must be work-related. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989). If an employer is found to be liable for the payment of compensation pursuant to an award of disability, it follows, in accordance with Section 7(a), that the employer is likewise liable for medical expenses incurred as a result of the claimant's injury. *Perez v. Sea-Land Servs, Inc.*, 8 BRBS 130, 140 (1978).

A claimant has established a prima facie case for compensable medical treatments when a physician finds treatment necessary for a work-related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984). In order for an employer to be liable for a claimant's medical expenses pursuant to Section 7(a), the expenses must be reasonable and necessary.[18] *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). The employer must raise the issue of reasonableness and necessity of treatment.[19] *Salusky v. Army Air Force Exchange Service*, 2 BRBS 22, 26 (1975). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 22 (1988); *Barbour v. Woodward & Lothrop, Inc.*, 16 BRBS 300 (1984).

An employee's right to select his own physician, pursuant to Section 7(b), is well-settled. *Bulone v. Universal Terminal and Stevedore Corp.*, 8 BRBS 515 (1978); 20 C.F.R. § 702.403. A claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. *Tough v. General Dynamics Corporation*, 22

---

[18] The employer is liable for medical services for all legitimate consequences of the compensable injury, including the chosen physician's unskillfulness or errors of judgment. *Linsay v. George Wash. Univ.*, 279 F.2d 819 (D.C. Cir. 1960); *see also Austin v. Johns-Manville Sales Corp*., 508 F.Supp. 313 (D. Me. 1981). *Wheeler v. Interocean Stevedoring*, 21 BRBS 33 (1988)(Improper, unauthorized medical treatment is not reimbursable).

[19] In *Kelley v. Bureau of National Affairs*, 20 BRBS 169,172 (1988), the Board held that where relevant evidence established that the claimant's psychological condition was occasioned, at least in part, by her work injury, treatment received by the claimant for this condition was compensable under the LHWCA.

BRBS 356 (1989); *Gilliam v. The Western Union Telegraph Co.*, 8 BRBS 278 (1978); 20 C.F.R. § 702.401(a).

In *Shahady v. Atlas Tile & Marble*, 13 BRBS 1007 (1981), *rev'd on other grounds*, 682 F.2d 968 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. *Banks v. Bath Iron Works Corp.*, 22 BRBS 301, 307, 308 (1989); *Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.*, 15 BRBS 299 (1983); *Beynum v. Washington Metropolitan Area Transit Authority*, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. *Atlantic & Gulf Stevedores, Inc. v. Neuman*, 440 F.2d 908 (5th Cir. 1971); *Matthews v. Jeffboat, Inc.*, 18 BRBS at 189 (1986).

An employer's physician's determination that the claimant is fully recovered is tantamount to a refusal to provide treatment. *Slattery Associates, Inc. v. Lloyd*, 725 F.2d 780 (D.C. Cir. 1984); *Walker v. AAF Exchange Service*, 5 BRBS 500 (1977); *Shahady v. Atlas Tile & Marble Co.*, 682 F.2d 968, 970 (D.C. Cir. 1982) (per curium), *rev'g* 13 BRBS 1007 (1981), *cert. denied*, 459 U.S. 1146 (1983). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. *Roger's Terminal and Shipping Corporation v. Director, OWCP*, 784 F.2d 687 (5th Cir. 1986); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988).

In light of my findings above that the Claimant is temporarily totally disabled due in part to her injuries suffered in the July 26, 1995 accident, I find this treatment for her repetitive injury of the right arm, wrist and forearm and psychological counseling compensable under the Act. I do not find that the Employer is liable for Claimant's medical bills incurred for the treatment of her neck, rotator cuff tear, and dizziness. The Claimant submitted an itemized list of medical expenses some of which were paid by the Employer, some paid by the Claimant and some were left unpaid. I am unable to distinguish which medical bills are related to her right arm injuries and psychological injuries.

At the hearing, the Employer's and Claimant's attorneys agreed to figure out which medical expenses were paid by the Employer, which were paid by the Claimant, and which bills remain unpaid. Counsel for the Claimant submitted a medical bill payment summary. The Employer did not submit any objections to the summary and did not offer any other evidence on the payment of medical bills. Therefore, I will use the Claimant's medical bill summary in calculating which unpaid medical bills the Employer is responsible.

According to the Claimant's medical bill payment summary, the Claimant had a total of $45,273.13 in medical bills. The Employer has paid $35,500.11 of the medical bills, leaving $9773.02 of the bills unpaid or paid by the Claimant. I have found the Employer liable for Claimant's medical bills relating to her right forearm, wrist, hand and psychological injuries. The

Claimant must establish that the medical expenses are related to the compensable injury. *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981); *Ballesteros v. Willamette Western Corp.* 20 BRBS 184, (1988); *Suppa v. Lehigh Valley R.R. Co.*, 13 BRBS 374 (1981). Because the Employer is liable for Claimant's psychological injuries, I order the Employer to pay Guyer Counseling's bill in the amount of $1575.00. I am unable to determine from the medical bill summary which unpaid bills are related to Claimant's right arm and psychological problems. Therefore, the Employer is ordered to pay $1575.00 and to pay for future medical treatment for Claimant's psychological and right arm injuries.

AVERAGE WEEKLY WAGE[20]

For the purposes of Section 10 and the determination of the employee's average weekly wage with respect to a claim for compensation for death or disability due to an occupational disability, the time of injury is the date on which the employee or claimant becomes aware, or on the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. *Todd Shipyards Corp. v. Black*, 717 F.2d 1280 (9th Cir. 1983) *cert. denied*, 466 U.S. 937, 104 S.Ct. 1910, 80 L.Ed.2d 459 (1984); *Hoey v. General Dynamics Corporation*, 17 BRBS 229 (1985); *Pitts v. Bethlehem Steel Corp.*, 17 BRBS 17 (1985); *Yalowchuck v. General Dynamics Corp.*, 17 BRBS 13 (1985). Compensation should be calculated at the time of disability, not the time of the injury. *Johnson v. Director, OWCP*, 911 F.2d 247 (9th Cir. 1990); *Bourgeois v. Avondale Shipyards & Director, OWCP*, 121 F.3d 219, 31 BRBS 137(CRT)(5th Cir. 1997). The parties have stipulated and I find that the claimant's average weekly wage is $174.12.

Section 8 of the Act, sets forth the scheme for the payment of compensation for disability. Section 8(a) deals with permanent total disability. Section 8(b) deals with temporary total disability. Section 8(c) deals with permanent partial disability. Section 8(d) deals with payment to survivors of certain unpaid employee benefits. Section 8(e) deals with temporary partial disability. Under section 8(b), in cases of temporary total disability, the employee is compensated with 66 2/3 percent of the average weekly wage during the period of the disability. Therefore, the Claimant is entitled to 66 2/3 percent of her average weekly wage of $174.13, amounting to $116.09.

INTEREST

A claimant is entitled to interest on any accrued unpaid compensation benefits. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556, 559 (1978), *aff'd in part, rev'd in part sub nom., Newport News Shipbuilding & Dry Dock Company v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The rate is that used by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills …" *Grant v. Portland Stevedoring Co.*, 16 BRBS 267, 270 (1984), *modified on recon.*, 17

[20] The term "wages" is defined at § 2(13). *See Universal Maritime Service Corp. v. Director, OWCP*, 33 BRBS 15(CRT)(4th Cir. 1999) for a comprehensive discussion of vacation, holiday and container royalty payments as wages within meaning of § 902(13).

BRBS 20 (1985). Interest is mandatory and cannot be waived in contested cases. *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833 (1982); *MacDonald v. Sun Shipbuilding & Dry Dock Co.*, 10 BRBS 734 (1978). The Board has held that the date that employer knows of an injury and therefore incurs an obligation to pay benefits under 33 U.S.C. § 914(b) is critical in determining the onset date for the accrual of interest. *Renfroe v. Ingalls Shipbuilding, Inc.,* 30 BRBS 101 (1996),at 105-106.

Here, according to Claimant's attorney, the Employer paid benefits until December 29, 1997. (TR 11). Thus, interest on unpaid compensation must accrue from that date.[21]

PENALTIES

Section 914(e)

The claimant is not entitled to an award of additional compensation, pursuant to the provisions of section 14(e), as the respondents have accepted the claim, provided the necessary medical care and treatment and voluntarily paid compensation benefits from the day of the accident to the present time and continuing. *Ramos v. Universal Dredging Corporation*, 15 BRBS 140, 145 (1982); *Garner v. Olin Corp.*, 11 BRBS 502, 506 (1979).

Failure to begin compensation payments or to file a notice of controversion within twenty-eight (28) days of knowledge of the injury or the date the employer should have been aware of a potential controversy or dispute renders the employer liable for an assessment equal to ten (10) percent of the overdue compensation.[22]

Section 914(e) of the Act provides:

> If any installment of compensation payable without an award is not paid within fourteen days after it becomes due . . . there shall be added to such unpaid installment an amount equal to 10 per centum thereof . . . unless notice is filed under subdivision (d) of this section . . . Subdivision (d) provides: If the employer controverts the right to compensation he shall file with the deputy commissioner on or before the fourteenth day after he has knowledge of the alleged injury or

---

[21] Since the purpose of awarding interest is to make the claimant whole and is not intended to penalize the employer, delays in the process of adjudication attributable to the Director, OWCP or to the Office of Administrative Law Judges do not constitute exceptions to the mandatory award of interest. Thus, even where the deputy commissioner caused a three-month delay which resulted in the compensation payment to the claimant being past due, the Board held the employer liable for interest since the employer had use of the money. *Garner v. Olin Corp.*, 11 BRBS 502, 508 (1979). Likewise, interest was due where there was a six-month delay between the hearing and the date of decision awarding the claimant benefits from the date of injury. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556, 560 (1978).

[22] The Benefits Review Board has held that "a notice of suspension or termination of payments which gives the reason(s) for such suspension of termination is the functional equivalent of a Notice of Controversion." *Hite v. Dresser-Guiberson Pumping*, 22 BRBS 87, 92 (19989); *White v. Rock Creek Ginger Ale Company*, 17 BRBS 75, 79 (1985); *Rose v. George A. Fuller Company*, 15 BRBS 194, 197 (1982) (Chief Judge Ramsey, concurring).

death, a notice . . . stating that the right to compensation is controverted. . .[23]

The first installment of compensation to which the section 14(e) assessment may attach is that installment which becomes due on the fourteenth day after the employer gained knowledge of the injury or the potential dispute. *Universal Terminal and Stevedoring Corp. v. Parker*, 587 F.2d 608 (3d Cir. 1978); *Fairley v. Ingalls Shipbuilding*, 22 BRBS 184 (1989), *aff'd in pert. part and rev'd on other grounds sub nom., Ingalls Shipbuilding v. Director*, 898 F.2d 1088 (5th Cir. 1990), *rehearing en banc denied*, 904 F.2d 705 (June 1, 1990) *Krotsis v. General Dynamics Corp.*, 22 BRBS 128 (1989), *aff'd sub nom. Director, OWCP v. General Dynamics Corp.*, 900 F.2d 506, 23 BRBS 40, 51 (2d Cir. 1990); *Rucker v. Lawrence Mangum & Sons, Inc.*, 18 BRBS 76 (1987); *White v. Rock Creek Ginger Ale Co.*, 17 BRBS 75, 78 (1985); *Frisco v. Perini Corp.*, 14 BRBS 798 (1981). Liability for this additional compensation ceases on the date a notice of controversion is filed or on the date of the informal conference, whichever is earlier.[24] *National Steel & Shipbuilding Co. v. U.S. Department of Labor*, 606 F.2d 875 (9th Cir. 1979); *National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1978); *Spencer v. Baker Agricultural Company*, 16 BRBS 205 (1984); *Reynolds v. Marine Stevedoring Corporation*, 11 BRBS 801 (1980).

Since the employer filed its controversion on December 4, 1997 and made its last payment in December of 1997 there is no basis for assessing a penalty under § 914(e).

Section 914(f)

Section 914(f), which applies only if an award is not paid in a timely manner, provides:

> If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation and amount equal to 20 percent thereof . . .

See, *Matthews v. Newport News Shipbuilding & Drydock Co.*, 22 BRBS 440 (1989). Since no award was previously payable, section 914(f) is inapplicable.[25]

V. CONCLUSIONS

I find that Ms. Nielson is temporarily totally disabled from performing her employment as a clerk or cashier at the U.S. Navy Exchange. The responsible employer/carrier is U.S. Navy

---

[23] See 20 C.F.R. § 702.233.

[24] The Board has held that "a notice of suspension or termination of payments which gives the reason(s) for such suspension of termination is the functional equivalent of a Notice of Controversion." *Hite v. Dresser-Guiberson Pumping*, 22 BRBS 87, 92 (1989); *White v. Rock Creek Ginger Ale Co.*, 17 BRBS 75, 79 (1985); *Rose v. George A. Fuller Co.*, 15 BRBS 194, 197 (1982).

[25] *See* 20 C.F.R. § 702.350.

Exchange and Crawford & Company. Her average weekly wage is $174.12. Furthermore, the Employer is liable for all reasonable and necessary medical expenses incurred in the treatment of the Claimant's total and temporary disability, including her psychological problems, counseling, pain management and repetitive right arm injury treatment. The Claimant is further entitled to interest, at the appropriate rate on the accrued unpaid compensation benefits. The Claimant is not entitled to any penalty, under section 14(e).

VI. ATTORNEY'S FEES AND COSTS[26]

Thirty (30) days is hereby allowed to the Claimant's counsel for the submission of such an application. A service sheet showing that service has been made upon all the partes, including the Claimant, must accompany the application. Parties have fifteen (15) days following receipt of any such application within which to file any objections.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore ORDERED that:

1. The Employer shall pay to the Claimant compensation for her temporary total disability from the time Employer ceased paying benefits, in December 1997, through the continuance of temporary total disability, based upon an average weekly wage of $174.12, such compensation to be computed in accordance with section 8(b) of the Act. The employer is entitled to a credit for benefits paid from October 30, 1995 through December of 1997.

2. Interest shall be paid by the Employer/Respondents and Special Fund on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director. All under-payments of compensation shall be paid to the Claimant in a lump sum with interest at the rate provided in 28 U.S.C. § 1961.

3. Pursuant to § 7 of the Act, the Employer, shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injuries referenced herein may require, even after the time period specified in the Order provision above, subject to the provisions of Section 7 of the Act.

---

[26] See 20 C.F.R. § 702.132.

4. In accordance with Section 7(a), that the Employer is likewise liable for medical expenses incurred as a result of the Claimant's injury. Employer is ordered to pay $1575.00 for psychological counseling rendered at Guyer Counseling and is ordered to pay for future medical treatment for Claimant's psychological and right arm injuries.

5. All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

RICHARD A. MORGAN
Administrative Law Judge

RAM:EAS:dmr

APPEAL RIGHTS: Appeals may be taken to the Benefits Review Board, U.S. Department of Labor, Washington, D.C. 20210, by filing a notice of appeal with the district director for the compensation district in which the decision or order appealed from was filed, within thirty (30) days of the filing of the decision or order, and by submitting to the Board a petition for review, in accordance with the provisions of part 802 of 20 C.F.R..